108 U.S. 143—218
108-143

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 139.

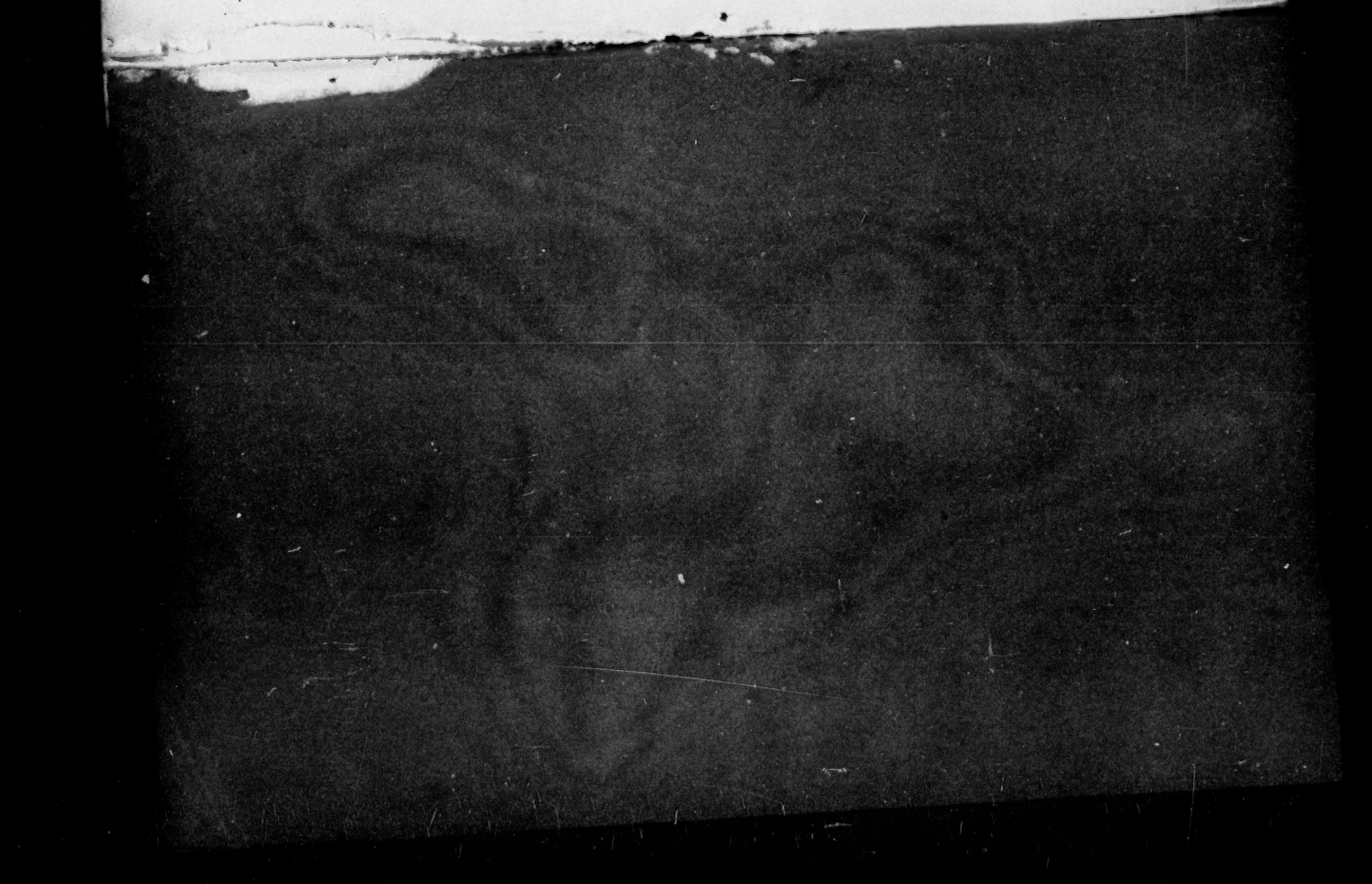
GEORGE W. EWELL, APPELLANT,

vs.

THOMAS J. DAGGS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED NOVEMBER 8, 1879.



SUPREME COURT OF THE UNITED STATES.

No. 139.

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vs.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

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a By the honorable Thomas H. Duval, one of the judges of the circuit court of the United States for the western district of Texas, to Thomas J. Daggs or his attorneys of record, Messrs. Walton, Green and Hill:

Whereas James B. Ewell, Mary W. Ewell, wife of J. B. Ewell, & George W. Ewell have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the western district of Texas, at Austin, made in favor of you, the said Thomas J. Daggs, and has filed the security required by law; you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Austin, in the western district of Texas, in the 5th circuit, the 27th day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] T. H. DUVAL,
U. S. Judge.

Test with seal of circuit court, at Austin, this 27th day of June, A. D. 1879.

M. HOPKINS, *Clk.*

b WESTERN DISTRICT OF TEXAS:

Alex. M. Jackson, jr., being duly sworn, saith that on the 19th day of September, 1879, at Austin, he served on the appellee, Thomas J. Daggs, a copy of this citation filed in this cause with the clerk of the circuit court in and for the western district of Texas, at Austin, by delivering copy of this citation to Wm. M. Walton, one of the firm of Walton, Green & Hill, attorneys of record, in this court for Thomas J. Daggs, the appellee in the foregoing recited cause.

ALEX. M. JACKSON, JR.

Sworn to this 19' day of September, A. D. 1879, before me.

M. HOPKINS, *Clerk.*

(Indorsed:) 94. Chancery. In U. S. circuit court, 5th circuit, west. dist. Texas, at Austin. Citation on appeal, issued June 27, 1879. M. Hopkins, cl'k.

1 United States circuit court in and for the western district of Texas, sitting at Austin. In equity.

Be it remembered that on the 14th day of January, in the year A. D. 1875, came the complainant, Thomas J. Daggs, by his solicitors, Walton, Green & Hill, and filed in the said circuit court, at Austin, his bill of complaint against the defendants, James B. Ewell, Mary W. Ewell, his wife, and George W. Ewell.

The bill of complaint is endorsed, to wit, No. 94, chancery. In chancery in U. S. C. court. Thomas J. Daggs vs. James B. Ewell, Mary W. Ewell, & George W. Ewell. Original bill. Filed January 14, 1875. M. Hopkins, clerk.

2 Complainant's bill is in words, to wit:

1335——1

In the U. S. circuit court for the western district of Texas, at Austin.
In chancery.

THOMAS J. DAGGS
vs.
JAMES B. EWELL, MARY W. EWELL, and George W. Ewell.

To the honorable the judges of the United States circuit court *of the United States* for the western district of Texas, at Austin:

Thomas J. Daggs, of Alleghany County, in the State of Virginia, and a citizen of said State, brings this his bill against James B. Ewell and his wife, Mary W. Ewell, both citizens of the State of Texas, residing in the county of McLennan, in said State, and against George W. Ewell, who is a citizen of the State of Texas, residing in the county of Dallas, in said State.

And your orator, the said Thomas J. Daggs, complains and says that on the 27th day of May, 1856, the said James B. Ewell, by the name of J. B. Ewell, (J. B. Ewell,) and his wife Mary W. Ewell, at San Antonio, in the State of Texas, made, executed, and delivered to your orator their certain promissory note of the date last aforesaid, payable three years after the said date, for value received, to your orator or his order for the sum of three thousand five hundred and fifty-six dollars.

That the said defendants, James B. and Mary W. Ewell, having failed to pay the said note as stipulated, your orator, on the 9th March,
3 1872, instituted, on the law side of the docket in the circuit court of the United States for the western district of Texas, at Austin, (No. 1254) a suit against the said J. B. and Mary W. Ewell, to recover the debt due upon said note, to which said suit the defendants appeared and pleaded, and on the 14th July, 1873, at the June or summer term of the said court, the said cause coming on to be heard, and the parties, plaintiff, and defendant, appearing by their attorneys, the plaintiff dismissed his said suit as to the said Mary W. Ewell, wife of *the* James B. Ewell, and thereupon, the said court rendered judgment against the said James B. Ewell, upon the said note for the sum of three thousand five hundred and thirty $\frac{95}{100}$ dollars, which said judgment stands in full force.

And your orator alleges that he did not take judgment in the said cause against the said Mary W. Ewell, but dismissed the same as to her, because it appeared that the said Mary W. Ewell, at the time of the signing the said promissory note was a married woman and the wife of the said James B. Ewell, and because of the want of power or jurisdiction in the said United States circuit court at law to render a proper or suitable judgment against the estate of the said Mary W. Ewell.

And your orator further shows that at the time of the making and delivery of the said promissory note the said defendants, James B. Ewell and Mary W. Ewell, in order to secure the same, made, executed, and
4 delivered to your orator their certain mortgage deed, dated on the 27th day of May, 1856, by which they conveyed to your orator the following described tract or parcel of land, to wit: In the county of Guadalupe, in the State of Texas, beginning at a stake on the bank of the Cibola Creek, at the upper corner of survey No. 6 and the lower corner of

the original survey from which a musquit 12 inches in diameter bears south 60½° west 4 varas; another musquit 12 inches in diameter bears north 81° east 25 varas; thence north 61° east 6,710 varas to a stake, from which a post oak, 41 inches in diameter, bears north 87° west 2 varas, and a post oak, 14 inches in diameter, bears north 15° west 17 varas; this being the southeast corner of the original survey; thence north 29° west 1,539 varas, to a post oak, 12 inches in diameter, from which a rotten post oak bears north 85° west 14 varas; another post oak 12 inches in diameter bears south 15° west 10 varas; thence south 61° west 6,205 varas, to a stake on the east bank of the Cibola Creek, from which a hackberr'y, 13 inches in diameter bears south 25° east 36 varas, and a musquit, 16 inches in diameter, bears south 27° west 10 varas, and a hackberry, 9 inches in diameter, bears 80° east 11 varas; thence down said stream with its meanders to the beginning; containing sixteen hundred and fifty-three acres of land, and a portion of survey No. 4 and 3, known as the Vincent Derran tract, being the same conveyed to James B. Ewell by Edward Dwyer (Drover) and Mariana Dwyer, his wife, by deed bear-
5 ing date 13th April, 1854, which said deed of mortgage made by the said James B. Ewell and his wife, Mary W. Ewell, was duly acacknowledged for probate by the said James B. Ewell, and which, at the same time and date, to wit, the said twenty-seventh of May, 1856, was by the said Mary W. Ewell, wife of said James B. Ewell, acknowledged privily and apart from her husband, as required by law for the execution and probate for registration of deeds of married women.

The said acknowledgments having been before an officer authorized by law to take the same, to wit, John D. McLeod, then chief justice of the county court of the county of Bexar, Texas.

And your orator avers that the said deed of mortgage so made, executed, and acknowledged, was filed for record in the county of Guadalupe, the county where said land was situated, at the time of making the said deed, on the 31st May, A. D. 1856, and was duly recorded in the said county of Guadalupe on the fifth day of June, 1856; all of which will more fully and at large appear by a certified copy of the said deed of mortgage, which is herewith filed and made an exhibit to this bill (marked Exhibit A).

The said copy being certified to be a correct copy by the custodian of the records of said county of Guadalupe.

And your orator avers that the original of the said mortgage is lost; that he has made and caused to be made in the clerk's office in Guadalupe County, where the said mortgage was recorded, due search for said
6 paper, but that it cannot be found; and he has searched his own papers, and has caused all of his agents who may by likelihood have had possession of the said mortgage to search their papers, without being able to find the said mortgage; and he has made due enquiry and search in every place whatever where there was a probability of finding the same, in order to find the said original mortgage, but without success.

Wherefore your orator avers that the said mortgage is lost and cannot be found so that he can produce the same on the trial of this cause, and he therefore prays to be permitted to set up and prove the execution and contents of the said lost mortgage, in order that the rights of your orator therein may be enforced.

And your orator further alleges that the amount of the said judgment

rendered against James B. Ewell on the 14th of July, 1873, as before set forth, with interest, is still due and unpaid, wholly, and that the said judgment is the remainder which was found due upon the note before described, executed by the said James B. and Mary W. Ewell, which note the said mortgage was intended to secure; and that the mortgaged premises set forth in said mortgage is bound for the said judgment and interest as aforesaid, and is liable to be sold for the benefit of your orator's debt as aforesaid to satisfy the same.

And your orator further shows and alleges that he has at no time in any manner intended to release the said mortgaged premises from the
7 debts aforesaid, or to impair his security in any respect.

That the said suit on the said note was brought by his attorneys, as he is informed and believes, in ignorance of the existence of the said mortgage, but if the same had been known by said attorneys the suit would have been brought on the said note and to foreclose the said mortgage as well; and when the existence of said mortgage was made known to them, if the said suit at law had been dismissed and another suit to foreclose the said mortgage had been commenced, the statute of limitations of four years would have operated as a bar to the said debt and the foreclosure of the said mortgage. Wherefore the said cause at law upon the said note was carried on to judgment as before stated.

And your orator shows that the business of taking the said note and security was carried on by his agents in Texas whilst your orator resided and continued to reside in Virginia, and the papers in reference thereto were in the hands of his said agents.

That at the request of the said James B. Ewell he had extended the time of payment of said note from time to time until the bar of the statute of limitations of four years was nearly completed, and feeling satisfied the defendant Ewell would not, or could not, pay the said debt, he directed his agent to hand over to attorneys competent in such matters all the said papers in relation to the said debt, that proper proceedings should be had in the courts to enforce the payment of the said note by the foreclosure of said mortgage.

8 That his said agent, as he is informed and believes, handed to his said attorneys only the note before mentioned, the said mortgage being then lost, for which reason the said attorneys not being aware of the existence of the mortgage brought the said suit at law. And your orator avers that his failure to sue for the foreclosure of the said mortgage in the first instance was caused by no fault upon his part, or the fault or neglect of the agents or attorneys he had employed, but was due and owing solely to the intervention of the war, from the time of taking the said note and mortgage and the removal from the State of Texas of the agents who took the same for your orator and to the confusion which was prevalent in all public and private affairs.

And your orator says that he had never been informed up to the time when he ordered proceedings to be commenced to collect the note and enforce the mortgage, nor till long after the suit aforesaid was brought, that the said mortgage was lost or mislaid so that it could not be found.

And your orator is informed and believes, and so charges, that the property mentioned in the said mortgage as between the said James B. Ewell and his wife, Mary W. Ewell, was the community property of the said

James B. and Mary W., being purchased by the said James B. during the marriage between said James B. and Mary W.

9 And your orator is advised that the said mortgaged premises is liable for the said debt created by the said note and which note is evidenced by the said judgment.

And your orator further shows that the said James B. Ewell is insolvent and unable to pay the said debt, either in money or out of the proceeds of any other property he has, save and except the said mortgaged premises; and your orator further shows that after obtaining his judgment aforesaid against the said James B. Ewell, on the 14th July, 1873, he caused execution to be issued thereon, to wit, on the 12th day of August, 1873, which execution was delivered to the marshal, and was by him levied upon the said mortgaged premises, but before any sale took place the said execution was returned into the circuit court of the United States at Austin by order of the plaintiff's attorney, and that no sale or other proceeding has been had thereon since that time.

And your orator shows that the said execution was returned, among other causes, because it was ascertained that, after the making and recording the deed of mortgage aforesaid to the complainant, by the said James B. & Mary W. Ewell, to wit, on the 6th day of September, 1856, the said James B. Ewell made a pretended deed to the same land embraced in the said mortgage to one George W. Ewell, the brother of said James B., which said pretended deed was found to have been recorded in the records of Guadalupe County, Texas.

10 And the said George W. Ewell, by virtue of the said pretended deed, sets up some right or interest in the said premises and claims the said land is not subject to the lien of said mortgage; and your orator avers that the said George W. Ewell continues to claim an interest or right in the said land, and he fears the said George W. will seek to disturb the rights of your petitioner in and to said mortgaged premises and the right of every purchaser who may purchase under a decree foreclosing the said mortgage as against the said James B. and Mary W. Ewell. Wherefore that the said land may be cleared of any incumbrances or pretended claims, derived through the said James B. Ewell, and that the said property, at any sale, under a foreclosure of the said mortgage may bring a full and fair price, it is insisted that the said George W. Ewell is a proper party to this proceeding; and your orator avers that the said pretended sale by James B. Ewell, if any did actually occur, and the pretended purchase by said George W. Ewell of the land embraced in the said mortgage, is a fraud as against your orator, because your orator avers that the said land and title thereto stood in the name and was the property of the said James B. Ewell, or the said James B. and Mary W. Ewell, the mortgagers, at the time the said mortgage was executed.

But sometimes the said George W. Ewell, as your petitioner is informed, pretends that the said land was bought by the said James B. Ewell

11 with the money of the said George W. and that the deed taken by him, the said James B., was without his authority, and that the said land was really the property of him, the said George W., and not liable to be mortgaged or sold by the said James B. or other person. But your orator avers that the said land was bought by the said James B. Ewell, and the deed taken in his own name more than two years before the execution of the said mortgage. That your orator was utterly ignorant of any claim

being set up by the said George W. and dealt with the said property as the property of the said James B. Ewell in the most perfect good faith, believing he had a just title thereto. That the title of the said James B. Ewell was apparently good upon its face, and believing it to be good, and that he had a right to sell the same, your orator, at the date of the said mortgage, advanced by way of loan to the said James B. Ewell a large sum of money, to wit, the sum of two thousand dollars, and that the said James B. and Mary W. Ewell executed the note and mortgage aforesaid, and delivered the same to your orator in consideration thereof, and the judgment before recited in the said circuit court of the United States at Austin is the product of the said note and interest thereon as adjudicated in the suit above named. Wherefore your orator avers that he is an innocent purchaser of the said land, so far as the said mortgage is concerned, for a valuable consideration and without notice of any equity or claim set up to it or
12 held by the said George W. Ewell, and he insists that the said Ewell shall, if he have any equity or claim in the said land, be postponed to your orator's said claim.

And your orator further avers that the said transaction between him and the said James B. and Mary W. Ewell in the making of the said loan to the said James B. Ewell, the taking of the said note and mortgage from the said James B. and Mary W. Ewell was made in good faith, and without notice of any claim or equity to the said land from George W. Ewell, or other person, and in the belief that the said mortgagers were the legal and equitable owners of the said land. That at the time of the said transaction there was no evidence on the records of the county of Gaudalupe that the said George W. Ewell had any right therein or thereto, and that by virtue of the statutes of the State of Texas in such case made and provided your petitioner acquired his interest in the said land as a security for said debt and note, free from any claim or claims of any person whatever, claiming or to claim the same by or through the said James B. Ewell. For your orator alleges that the said mortgage was executed and recorded in the county wherein the said land mentioned in it is situated before the deed above referred to was executed to the said George W. Ewell, and without any notice of any equity in him thereto.

And petitioner further alleges that as to him the said deed or pretended deed is fraudulent and void, and he denies that there was ever any consideration therefor, but believes that the same was, is, colorable, and
13 executed, if executed at all, which is not admitted, for the purpose of delaying, hindering, and defrauding the creditors of the said James B. Ewell, and particularly to delay, defeat, and defraud your orator.

The premises considered, your orator prays that an account be taken by and under the direction and decree of this honorable court of what is due and owing to your orator for principal and interest moneys upon and by virtue of his said recited mortgage security, and the said James B. Ewell and Mary W. Ewell may be decreed to pay and satisfy to your orator what shall appear to be due and owing on the taking of the aforesaid account by a short day, to be appointed by this honorable court, together with your orator's costs, and in default thereof, the said James B. Ewell and Mary W. Ewell, and all persons claiming under them, or either of them, may be absolutely barred and foreclosed as to any claim in and to the said mortgaged premises, and every part thereof, and may deliver over to your orator

all deeds, writings, and documents whatsoever in their custody, possession, or power relating to or concerning the said premises, and every part thereof.

And that this may done, your orator prays that the said last mortgage of the said James B. Ewell and Mary W. Ewell to your orator may be set up and established by proof of the execution and contents of the same.

And that the pretended deed of the said James B. Ewell to George
14 W. Ewell may, if found fraudulent and made with an intent to cheat, hinder, and delay creditors of the said James B. Ewell, be delivered up and cancelled, and if the same be not so found, that the rights claimed in the said mortgaged premises by the said George W. Ewell be postponed to the rights of your orator under the said mortgage.

And your orator prays that he may have such other and further relief as the nature of the case may require and to equity belongs.

May it please your honors to grant to your orator a writ of subpœna, directed to the said James B. Ewell and Mary W. Ewell, his wife, and to the said George W. Ewell, thereby commanding them, and each of them, at a certain time and under a certain penalty therein to be limited personally to be and appear before this honorable court, and then and there full, true, and direct and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this hon'able court shall seem meet.

THOMAS J. DAGGS, *Compl.*

THE STATE OF TEXAS,
Travis County:

Before the undersigned personally came Thomas J. Daggs, the complainant in the foregoing bill, and being duly sworn as required by law, deposes and says that the matters set forth and stated in the foregoing bill, so far as stated of his own knowledge, are true, and so far as stated
15 on his knowledge, information, and belief he believes the said statements to be true.

He further states that the original of the mortgage from James B. and Mary W. Ewell to the complainant set forth in said bill has been lost; that he has made due search for the same, and that it cannot be found.

THOMAS J. DAGGS.

Sworn to and subscribed before me this 14th day of January, A. D. 1875, by the said Thomas J. Daggs.

M. HOPKINS, *Clerk.*

Exhibit A, filed with the bill, is indorsed, to wit: No. 94. Chancery. J. B. Ewell & Mary W. Ewell to Thomas J. Daggs. Copy of mortgage. Filed January 14th, 1875. M. Hopkins, clerk. Exhibit A.

And is in words to wit:

16 *Exhibit A, filed with original bill, endorsed, filed January* 14, 1875.—M. HOPKINS, *cl'k.*

STATE OF TEXAS,
County of Bexar:

Whereas we, John B. Ewell and Mary W. Ewell, his wife, of the county of Bexar, and State of Texas, are justly indebted Thomas I. Daggs, of the county of Alleganey, and State of Virginia, in the sum of three thousand four hundred and fifty-six dollars ($3,456.00), evidenced by

our promissory note to said Thomas I. Daggs of this date, due and payable on the 27th day of May, A. D. one thousand eight hundred and fifty-nine (1859), and being desireous to secure to the said Thomas I. Daggs the payment of the said sum of three thousand four hundred and fifty-six dollars, as aforesaid, we have this day granted, bargained, sold, released, and conveyed, and do by these presents grant, bargain, sell, release,
17 and convey, unto the said Thomas I. Daggs, his heirs and assigns, a certain tract or parcel of land lying and being in the county of Gaudalupe, and State of Texas, and bounded as follows, to wit: Beginning at a stake on the bank of the Cibola Creek at the *at the* upper corner of survey No. 6 and the lower corner of the original survey, from which a misquite 12 in. dia. bears S. 60½ W. 4 varas; another misquite 12 in dia. bears N. 81° E. 25 varas; thence N. 61° E. 6,710 va's to a stake, from which a post oak 41 in. dia. bears north 87° W. 2 varas, and a post oak 14 in. dia. bears north 15° W. 170 v's, this being the southeast corner of the original survey; thence N. 29° W. 1,539 va's to a post oak 12 in. dia., from which a rotten post oak bears N. 85° W. 14 v's, and another post oak 12 in. dia. bears S. 15° W. 10 v's; thence S. 61° W.
18 6,205 v's to a stake on the east bank of the Cibola Creek, from which a hackberu 13 in. dia. bears S. 25° E. 36 v's, and a misquite 16 in. dia. bears S. 80° E. 11 v's; thence down said stream with its meanders to the beginning, containing sixteen hundred and fifty-three acres of land, and a portion of survey No. 4 and 3 known as the Vincent Duran tract, being the same conveyed to James B. Ewell by Edward Dwyer and Mariana Dwyer, his wife, by deed bearing date 13th April, A. D. 1854, together with all and singular the rights, members, hereditaments, and appurtenances, the same belonging or in any wise incident or appertaining, to have and to hold all & singular the premises above mentioned, unto the said Thomas I. Daggs, his heirs and assigns, forever. And we, the said James B. Ewell and Mary W. Ewell, do hereby bind our-
19 selves, our heirs, &c., to warrant and forever defend all and singular the said premises unto the said Thomas I. Daggs, his heirs and assigns, against all persons lawfully claiming or to claim the same. Nevertheless it is expressly understood and agreed between the parties hereto that this conveyance is only assigned to operate as a mortgage, and is to be void as soon as the said Thomas B. Ewell, Mary B. Ewell, his wife, shall pay or cause to be paid to the said Thomas I. Daggs the said sum of three thousand four hundred and fifty-six dollars as aforesaid, otherwise to remain in full force and effect.

In testimony whereof we have hereto signed our names and affixed our seals, using scrolls for seals, at the city of San Antonio, this twenty-
20 seventh day of May, A. D. 1856.

J. B. EWELL, [SEAL.]
MARY W. EWELL. [SEAL.]

Signed, sealed, and delivered in presence of—
J. J. ALLEN.
JNO. D. MCLEOD.

STATE OF TEXAS,
County of Bexar:

Before me, John D. McLeod, chief justice & ex officio notary public in

and for the county and State aforesaid, personally appeared J. B. Ewell, to me well known, who acknowledged that he signed, sealed (using scroll for seal), and delivered the within mortgage or writings for the purposes & considerations therein stated & expressed; at the same time personally appeared Mary W. Ewell, wife of J. B. Ewell, parties to a certain mortgage or writing, bearing date of the twenty-seventh day of May, A. D. 1856, on the reverse hereof and having been examined by me privily and apart
21 from her husband and having the same fully explained to her, she, the said Mary W. Ewell acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, (using scrawls for seals) and delivered the same, and that she wished not to retract it. To certify which I hereto sign my name and affix the impress of my official seal, at office in the city of San Antonio, this 27th day of May, A. D. 1879.

JNO. D. LEOD,
Chief-Justice & ex officio Not. Public, Bexar Co.

Filed in my office for registration the 31st day of May, A. D. 1856, at 6 o'clock p. m., and duly recorded the 5th day of June, A. D. 1856, at 9 o'clock a. m.

J. W. CUMMINGS,
C. C. C. G. C.
By W. A. PITTS,
Deputy.

22 THE STATE OF TEXAS,
Guadalupe County:

I, F. A. Vaughan, clerk of the district court of Guadalupe County Texas, do hereby certify that the above and foregoing is a correct copy as appears of record in mortgage book "A" of Guadalupe County, pages 660, 661, & 662.

In testimony of which I hereunto sign my name and affix the impress of my official seal, at office in Seguine, this the 27th day of January, A. D. 1873.

[L. S.] F. A. VAUGHAN,
Clk D. C. G. C.,
By ASA J. L. LOWELL,
Deputy.

(Endorsed, to wit:) No. 94. Ch'cy. J. B. Ewell & Mary W. Ewell to Thomas I. Daggs. Copy of mortgage. Filed January 14, 1875. M. Hopkins, cl'k. Exhibit A.

23 Subpœnas issued to all the defendants same day in form, to wit

UNITED STATES OF AMERICA,
Western District of Texas:

Circuit court of the United States for the western district of Texas, at Austin, sitting in chancery.

The President of the United States to the marshal of the western district of Texas, and to all to whom these presents shall come, greeting:

Thomas J. Daggs, of Alleghany County, in the State of Virginia, and a

citizen thereof, having filed his bill of complaint against James B. Ewell and his wife, Mary B. Ewell, citizens of the State of Texas, residing in the county of McLennan, and against George W. Ewell, who is a citizen of the State of Texas, residing in the county of Dallas, in the State of Texas, in said district, who are made defendants:

We command you, and every one of you, the defendants herein named, that, laying all other matters and excuses aside, you do cause an appearance to be entered for you in our court of chancery to the bill herein recited and exhibited against you, and that you do answer concerning such things as shall then and there be alleged against you, and observe what our said court shall direct in this behalf, upon pain of an attachment issuing against your person and such other process for contempt as the court shall award.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, at Austin, this 14th day of January, A. D. 1875.

M. HOPKINS, *Clerk.*

24 Appearances are to be entered on or before the first Monday of March next, March rules; otherwise the bill may be taken as confessed.

M. HOPKINS, *Clerk.*

Marshal's return upon writ served on James B. Ewell is in words, to wit:

Came to hand 23d of February, 1875, and served March 3rd, 1875, in San Antonio, Texas, by delivering to James B. Ewell in person a true copy of this writ.

THOMAS F. PURNELL,
U. S. Marshal W. D. of Tex.,
By LEOPOLD HUPPERTY,
Special Deputy U. S. M.

Service, $2.00; m. mile'ge, 5.10; return, .75—$7.85.

Marshal's return upon subpœna served on Mary W. Ewell, wife of James B. Ewell, is endorsed, to wit:

Came to hand January 22, 1875, & executed Feb'y 2d, 1875, by delivering to Mary B. Ewell in person a true copy of the within subpœna.

THOS. F. PURNELL,
U. S. Marshal,
By S. R. EVANS, *Deputy.*

And afterwards, at March rules, the following entry appears:

THOMAS J. DAGGS, COMPLAINANT,
vs.
JAMES B. & MARY W. EWELL, HIS WIFE, and George W. Ewell. } 94. Ch'y.

AUSTIN, *March 1st*, 1875.

Now come the defendants served with subpœna and enter their appear-

ance in this cause by their solicitors, W. E. Goodrich & Jackson & Jackson.

Test. M. HOPKINS, *Clerk.*

And afterwards the following entry appears at April rules, 1875:

APRIL 5TH, 1875.

THOMAS J. DAGGS
vs. } 94. Ch'y.
JAMES B. EWELL ET ALS.

Now come the solicitors of complainant and file their amended bill with the following endorsement:

We waive service of notice & copy, and agree to the filing the amendment.

JACKSON & JACKSON,
For Geo. W. Ewing.
CARLETON & ROBERTSON,
For Ewings.

Filed & entered April 5, 1875. M. Hopkins, clerk.

25 Amended bill is endorsed, to wit: No. 94. In chancery. Thomas J. Daggs vs. James B. Ewell et al. Amended bill. Filed April 5, 1875. M. Hopkins, cl'k.

We waive service of notice & copy, and agree to the filing of this amendment.

JACKSON & JACKSON,
For GEO. W. EWING.
CARLTON AND ROBERTSON,
For J. B. & Mary W. Ewell.

The amended bill is in words, to wit:

Amended bill.

To the judges of the circuit court of the United States for the western district of Texas, sitting at Austin:

Thomas J. Daggs, a citizen of the State of Virginia, brings this his amended bill against James B. Ewell and his wife, Mary W. Ewell, of McLennan County, and George W. Ewell, of Dallas County, all of whom are citizens of the State of Texas, within your honors' jurisdiction, and thereupon your orator complains and says that heretofore, to wit, on the 14th day of January, 1875, your orator exhibited his bill against the said defendants in your honorable court for the purpose of foreclosing a mortgage alleged in the said bill to have been executed by the defendants James B. Ewell and Mary W. Ewell to the complainant, dated seventh day of May, 1856, and which was alleged to be recorded in the county of Guadalupe, and which said mortgage was alleged to be upon certain lands in said Guadalupe County and intended to secure a certain debt to the com-
26 plainant in said bill mentioned, which said mortgage was alleged to be lost; and the complainant prayed that the said mortgage should be set up and established as a lost instrument, and presented with said bill

as an exhibit thereto a certified copy of the said mortgage, as the same appears of record in the county of Guadalupe aforesaid, and thereupon the said complainant asked that the said mortgage be foreclosed as against the said James B. Ewell & wife, Mary W. Ewell, as aforesaid, for the benefit of the debt aforesaid.

And the said bill further alleged that the defendant George W. Ewell pretended to set up some right or interest in the land aforesaid described in the said mortgage, and to claim the same adversely thereto and to your petitioner through the said James B. Ewell or James B. Ewell and wife, the mortgagers as aforesaid; wherefore he was made party thereto.

And now, may it please your honors, your orator alleges and avers that though he had made the search for the said mortgage before bringing the said bill and was unable to find it, yet since the filing of his said original bill the said mortgage has been found and has been placed in the possession of the said complainant, and will be produced on the hearing hereof, or will be filed in this case or exhibited to the defendants if demanded. The said mortgage being correctly described in the said original bill.

And your orator alleges that the defendants have not put in their answers to the said original bill, and he is advised to amend his said bill.

27 Your orator further shows and alleges that he could not sooner have made this amendment, and that the information in regard to the existence of said original mortgage was given him since the filing of said original bill, and that this amendment is not intended for the purpose of delay but because the same is considered to be material for the case of the plaintiff.

The premises considered, your orator prays for leave to file this amended bill setting up the original mortgage mentioned in said bill and for the enforcement thereof as prayed in the said original bill against the defendants, James B. and Mary W. Ewell, and also as against the claim or claims of George W. Ewell, and for the judgment and decree prayed for in said original bill and for general relief.

THOMAS J. DAGGS,
Complainant.

WALTON, GREEN & HILL,
Sol. for Compl't.

And on the same day the following entry appears upon the rule or order-book.

THOMAS J. DAGGS
vs.
JAMES B. EWELL ET AL. } 94. Chancery.

And now comes George W. Ewell, by his solicitors, Jackson & Jackson, and James B. and Mary W. Ewell, his wife, by Carleton and Robertson, their solicitors, and enter an appearance for the defendants.

JACKSON & JACKSON &
CARLETON & ROBERTSON,
For Def'ts.

28 And afterwards the following agreement was filed. E'dorsed, to wit: No. 94. Chancery. Tho. J. Daggs vs. J. B. Ewell et al. Agreement. Filed May 1, 1*st*, 1875. M. Hopkins, clerk.
In words, to wit.

It is agreed that defendants may have until first Monday in June to file answer or demurrer to complainant's bill in above stated cause.
Austin, April 21, 1875.

WALTON, GREEN & HILL,
For Compl't.

And afterwards the demurrer and answer of George W. Ewell was filed. Endorsed, to wit: No. 94. Chancery. Thomas J. Daggs vs. James B. Ewell et als. Demurrer and answer of George W. Ewell. Filed June 5th, 1875. M. Hopkins, clerk. W. E. Goodrich and Jackson & Jackson for G. W. Ewell.

Demurrer & answer of George W. Ewell.

And is in words, to wit:

In chancery. In the circuit court of the United States for the 5th circuit' sitting in chancery at Austin, Texas, for the western district of the State of Texas.

THOMAS J. DAGGS, PLAINTIFF,
vs.
JAMES B. EWELL, MARY W. EWELL, & GEORGE W. Ewell, defendants.

29 The demurrer of the defendant, George W. Ewell, to part, and his answer to the residue, of the bill of complaint of Thomas J. Daggs, plaintiff.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, demurs to so much of the said bill, as prays that the land mentioned in said bill be sold to satisfy the plaintiff's demand against James B. Ewell and Mary W. Ewell and to so much of said bill as prays for any decree or relief as against this defendant or to the pre*j*udice of his title in or to the said land.
And for cause of demurrer this defendant shows:
I. That it appears with certainty on the face of the plaintiff's said bill, that the note and mortgage of James B. Ewell and Mary W. Ewell, mentioned and described in said bill, as the only cause of action relied on by the plaintiff as against this demurrant, did mature and fall due on the 27th day of May, A. D. 1859, being more than four (or even fifteen) years prior to the commencement of this suit; and that it further appears by the said bill that nothing but the plaintiff's own neglect or laches, or the neglect or laches of the plaintiff's own agents or attorneys, is relied on by the plaintiff to avoid the bar of the statute of limitations of the State of Texas; and so it is apparrent on the face of the bill, that the plaintiff's cause of

action as against this demurrant was barred by the statute and law
30 of limitations of the State of Texas, prior to and at the time of the commencement of this suit on, to wit, the 14th day of January, 1875.

II. That it appears by the plaintiff's said bill, that by the lapse of time, and by the plaintiff's own neglect, laches, or default, or by the neglect, laches, or default of his agents or attorneys, his cause of action (if any he ever had) as against this demurrant, is wholly barred, precluded and lost; and that the same as against this demurrant, is a "stale demand."

III. That it appears by the plaintiffs' said bill, that he has already obtained upon the said note a judgment at law against the said James B. Ewell, and that the said judgment remains in full force, so that the plaintiff, if the statements of his bill be true, has already elected his remedy in a court of law, and that the same is full, adequate, and complete; and that it further appears by said bill, that the plaintiff has no title in or to said land, and no such interest in said land as is necessary to sustain this bill, as a bill to "remove clouds, &c.;" so that the plaintiff has not made or stated such a case as entitles him in a court of equity to the relief prayed for, or to any relief, as against this demurrant.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurs, and demands judgment of this court whether he shall be compelled to make other or further answer to
31 the said parts of said bill; and he prays, &c.

W. E. GOODRICH &
JACKSON & JACKSON,
Sol's for G. W. Ewell.

The undersigned, counsel of the defendant, George W. Ewell, certify that the foregoing demurrer is, in our opinion, well founded in points of law.

JACKSON & JACKSON,
Of Counsel for said Def't.

AUSTIN, TEXAS, *May* 15, 1875.

THE STATE OF TEXAS,
Harrison County, ss:

On this 22d day of May, A. D. 1875, before the undersigned authority, personally came George W. Ewell, who, being duly sworn, states that he is the same George W. Ewell, who is one of the defendants in the above-entitled suit of Thos. J. Daggs vs. James B. Ewell and others; and that the foregoing demurrer is not interposed for delay.

GEORGE W. EWELL.

Sworn to and subscribed before me the day and year above written.

C. W. STEDMAN,
U. S. Commissioner for the Western District of Texas.

And as to the residue of said bill, this defendant, for answer to so much thereof as he is advised it is material for him to answer, says:

That he wholly denies the statement in the said bill that the land described therein is, or ever was, the property of said James B. Ewell and Mary W. Ewell, or either of them, or that they or either of them has or

ever had the right or authority to mortgage the same, or any part
32 or interest thereof, to the plaintiff or to any other person, and more explicitly this defendant denies that the said James B. Ewell purchased the said land during the marriage between the said James B. and Mary W., as charged in said bill, the fact and the truth being that the said James B. Ewell never purchased the said land at any time or from any person, but that this defendant, in the year 1853 or 4 purchased the said land from the said Edward Dwyer, and that all of the money paid to the said Dwyer for said land was the money of this defendant, and was not, either in whole or in part the money of the said James B. and Mary W. Ewell, or either of them.

Further answering, this defendant says that he does not personally know why the said Dwyer and wife made any deed for, or conveyance of said land to the said James B. Ewell, but long after the making of such deed or conveyance, defendant was informed that it was so made for the reason that this defendant then resided in the State of Mississippi, and conducted through said James B. Ewell (then residing not far from San Antonio) his correspondence with said Dwyer, at San Antonio, respecting the said land, and that the said Dwyer and the said James B. thought it best, for reasons of their own, that the said deed should be made to the said James B. Ewell. But this defendant positively states that he never authorized or assented to such a conveyance of the said land, that he had no knowledge
of the same until long after it was done, and that as soon as practi-
33 cable after the same came to his knowledge, he demanded and received from the said James B. a conveyance of said land to himself. And this defendant says that previous to the said conveyance from said James B. to himself, he had no knowledge and no notice, or information that said James B. had attempted to mortgage the said land to the plaintiff, or to any one.

This defendant, however, does not admit that the said James B. and Mary W. Ewell ever executed any mortgage on said land, as alleged in said bill; and he demands strict proof thereof, if such be the case; but he states that on the 27th of May, 1856, (the alleged date of the pretended mortgage) he, this defendant, was in total ignorance that any deed or conveyance of said land had been made to or in the name of said James B. Ewell, or that there was even an ostensible right in the said James B. to deal with the said land in any respect whatever; and it was not until the month of Nov'b'r, 1873, that this defendant ever heard that said James B. had attempted to mortgage the said land.

Further answering, this defendant does not admit, but upon his information and belief denies that the said James B. Ewell and Mary W. Ewell, or either of them, obtained from the plaintiff, or from his agents or attorneys, upon the faith of a mortgage of said land, the sum of money in said bill mentioned, or any sum of money.

And this defendant fully and explicitly denies each and every allegation of fraud in the said bill contained, in so far as the same have any reference or application to this defendant; and he further denies that
34 he, or that any one by his authority or consent, or with his knowledge, ever made any deed to him or to any one, or ever dealt with the said land in any way, for the purpose of hindering, delaying, or defrauding any creditor of the said James B. Ewell, whether such creditor was the plaintiff in this cause or any other person.

And further answering, this defendant states that long previous to the filing of this bill, and, as well as he now remembers, in the year 1856 or 1857 he sold and conveyed a portion of said land, to wit, about 555 acres, to J. B. Wilson, who subsequently resided thereupon for a number of years, and who, so far as defendant is informed and believes, is still the owner of said 555 acres.

Defendant believes that the said J. B. Wilson is still a resident of the said western district of Texas, and that he is a necessary party to this suit; and, therefore, defendant insists that there is a want and defect of proper parties to the plaintiff's bill of complaint.

And now this defendant, having fully answered every allegation in said bill which it is incumbent on him to answer, prays to be hence dismissed with his reasonable costs, &c., &c.

GEORGE W. EWELL, *Defendant.*

W. E. GOODRICH,
JACKSON & JACKSON,
Austin, Texas,
Sol's for Def't G. W. Ewell.

35 THE STATE OF TEXAS,
Harrison County:

On this, the 22d day of May, A. D. 1875, before the undersigned authority, personally came George W. Ewell, one of the defendants in the above-entitled cause of Thos. J. Daggs vs. James B. Ewell and others, and who is personally known to me; who, being duly sworn, deposes and says that the matters set forth and stated in the foregoing answer, so far as stated of his own knowledge are true, and so far as stated on his information and belief he believes them to be true.

GEORGE W. EWELL.

Sworn to and subscribed before me the day and year above written.

C. W. STEDMAN,
U. S. Commissioner for the Western Dist. of Texas.

And afterwards the following entry appears upon the rule or order book:

THOMAS J. DAGGS
vs. } 94.
JAMES B. EWELL AND OTHERS.

JULY 10, 1875. Term time.

Now comes the complainant, by his solicitors, Walton, Green & Hill, and sets down for hearing on Monday, the 12th inst., before the court, the demurrer filed by the respondent, Geo. W. Ewell, as well also as his objection to complainant's bill for want of parties.

M. HOPKINS, *Clk.*

And afterwards the following entry appears upon the chancery minutes of the court:

36 *Judgment on demurrer and on objection to want of parties.*

U. S. circuit court, west. dist. Texas. In chancery. No. 94. June term, 1875.

SATURDAY, *July 24th*, 1875.

THOMAS J. DAGGS
vs.
JAMES B. EWELL, MARY W. EWELL, & George W. Ewell.

The demurrer of the defendant George W. Ewell to part of the bill of complaint filed herein having been considered, it is ordered and adjudged that the same be overruled.

It further appearing from the answer of said defendant that one J. B. Wilson is interested in the result of this suit, and is a proper and necessary party thereto, it is ordered that the objection for want of proper parties, as made by said defendant, be sustained, and that complainant make said Wilson a party defendant, if found within the jurisdiction of the court.

T. H. DUVAL,
U. S. Judge.

And afterwards, at adjourned June term, 1875, the following entry appears on the chancery minutes:

MONDAY MORNING, *August 23d*, 1875.

DAGGS
vs.
EWELL ET AL. } 94. Ch'y.

The demurrer in this cause having been heretofore overruled, it is ordered that defendants answer to so much of complainant's bill as may be covered by the demurrer on or before the rule day in November next.

T. H. DUVAL.

37 And afterwards, to wit, on the 23 day of September, 1875, the following amended bill was filed. Endorsed, to wit: No. 94. In chancery. Thomas J. Daggs vs. James B. Ewell and wife and others. Amended bill. Filed & ent'd Sept. 23d, 1875. M. Hop-kins, cl'k.

And which is in words to wit:

Amended bill. Filed Sept. 23d, 1875.

In chancery in U. S. circuit court for west. dist. Texas, at Austin.

THOMAS J. DAGGS, COMPL'T,
vs.
JAMES B. EWELL ET AL., DEF'TS.

To the honorable the judges of the circuit court of the United States for the western district of Texas, at Austin:

Thomas J. Daggs, a citizen of the State of Virginia, brings this his

amended bill against James B. Ewell, and his wife, Mary W. Ewell, citizens of the State of Texas, residing in McLennan County, and George W. Ewell, a citizen of Texas, residing in Dallas County, also against Mrs. Laura Smith, wife of John F. Smith, and against the said John F. Smith, citizens of Texas, residing in Travis County, also against Ida Wilson, Sallie Wilson, and Minnie Wilson, who are minors and citizens of Texas, residing in Travis County, with John F. Smith aforesaid, who is their guardian, and against George Knight, a citizen of Texas, residing in Guadalupe County.

And thereupon your orator complains and says: That heretofore, to wit, on the 14th day of January, 1875, your orator exhibited his bill in your honorable court against the defendents, James B. Ewell and wife and George W. Ewell, for the purpose of foreclosing a mortgage alleged in the bill to have been executed by the defendants, James B. Ewell and
38 Mary W. Ewell, to secure a certain debt named therein, due and owing to the complainant, which mortgage was alleged to have been dated on the 27th May, 1856, and which was alleged to embrace a certain tract of land in Guadalupe County, in the State of Texas, containing sixteen hundred and fifty-three acres, known as the Vincent Duran tract, and being the same which was conveyed to James B. Ewell by Edward Dwyer and his wife, Manoma Dwyer, by deed bearing date 13th April, 1854, and which mortgage was alleged, at the date of filing the said bill, to be lost, but which has since that time been found, and which has been brought before your honor in an amended bill of the complainant filed in this cause on the 5th of April, 1875. And thereupon the said complainant prayed that the said mortgage be foreclosed as against the said James B. Ewell, and Mary W. Ewell aforesaid, for the benefit of said debt; and the said bill further alleged that the defendant George W. Ewell pretended to set up some right or interest in the land aforesaid and claim the same adversely to the right of the complainant in respect to his mortgage as aforesaid, wherefore he was made a party thereto.

And the said defendant George W Ewell having answered the said bill as amended, and having set up a claim to the said land, and having further set up that he had sold a portion of the said land to J. B. Wilson, viz, five hundred and fifty-five acres, and that J. B. Wilson was a
39 resident of the western district of Texas, and should be made a party hereto.

The said suggestion that the plaintiff's bill was imperfect for want of proper parties was set down for hearing before the court, and by the said court it was determined that the said J. B. Wilson was a proper and necessary party to the said bill.

And complainants aver that since the said decision of the said court that the said bill was defective for want of making the said J. B. Wilson a party thereto, he has made diligent inquiry as to the said Wilson, and he has ascertained that the said J. B. Wilson before the filing of said bill died, leaving as his heirs at law children as follows, to wit, Laura, wife of John F. Smith, and Ida, Sallie, and Minnie Wilson, all of whom are minors and reside in Travis County, Texas, who complainant avers are represented by their guardian the said John F. Smith, and that he has not been able sooner to ascertain the facts, for which reason he has not heretofore filed this amendment.

And complainant shews that heretofore, to wit, on the 27th of May, 1856, the said James B. Ewell and his wife, Mary W. Ewell, as stated in the bill, executed to said complainant their certain promissory note for the sum of three thousand four hundred and fifty-six dollars, and at the same time executed their mortgage to complainant on the above-mentioned tract or parcel of land, being sixteen hundred and fifty-three acres of land in Guadalupe County, Texas, as aforesaid, known as the Vincent
40 Duran tract, and which was conveyed by Edward Dwyer and his wife, Mariana Dwyer, to the defendant James B. Ewell on the 13th April, 1854.

That the said deed of mortgage was duly recorded in the records of the county of Guadalupe aforesaid, on the 3rd day of June, 1856, having before that time, to wit, on the 31st May, 1856, been filed for record in office of the clerk of the county court of said county.

That afterwards, to wit, on the 14th July, 1873, your orator obtained a judgment on the said note against the defendant James B. Ewell for the sum of three thousand five hundred and thirty $\$5\frac{25}{100}$ dollars.

That upon taking execution against the said James B. Ewell, with the purpose of selling the land aforesaid, complainant ascertained that the said defendant James B. Ewell, after the execution and registry of the said mortgage to complainant, had made a deed to the said land embraced in the said mortgage to the defendant George W. Ewell, the same being dated on the 6th of September, 1856, and recorded in the county of Guadalupe on the 10th day of September, 1856, in book of deeds F, page 791.

That the said George W. Ewell, after his said purchase of the said land of James B. Ewell, and after the date of the deed aforesaid to him from the said James B. Ewell, sold to I. B. Wilson, five hundred and fifty-five acres of the same, which is now claimed by the defendants John F. Smith and wife Laura, and by Ida, Sallie, & Minnie Wilson, minors as aforesaid.

And complainant alleges that the said purchase of the said
41. land by the said George W. Ewell from James B. Ewell was fraudulent as against this plaintiff in this suit, and was intended to deprive him of his just rights, or to so harrass and vex the plaintiff that his claim should be worthless, and in order the more effectually to injure the plaintiff the said George W. Ewell, since he received the deed aforesaid from the said James B. Ewell, has assumed to sell a part or portion of the land to James B. Wilson, as aforesaid, who is dead, as aforesaid, whose heirs, as aforesaid, set up and claim title to the same under said deed, and the said George W., as your orator is informed and believes, about the time of bringing the original bill herein, but before the same was filed, with a view to further harrassing complainant, and hindering him from making his said mortgage from James B. Ewell and wife, as aforesaid, available for the satisfaction of the debt hereinbefore stated, has sold, or by some contract, the precise nature of which is not known, bound himself to convey to the defendant the said George Knight a part or portion of the said land upon condition that the said Knight shall take and hold possession thereof for the said George W. Ewell.

That in accordance therewith the said George Knight, for himself, or for himself and the said George W. Ewell, went into possession of the said land, and so remains, as your orator is informed.

42 Your orator does not pretend to know the precise terms of the

agreement between the said George W. Ewell and George Knight, but calls upon them for a discovery of the truth in relation thereto.

But your orator avers that the said George W. Ewell and the said George Knight are acting in concert with one another to defeat the claim of your orator and the foreclosure of said mortgage.

Your orator alleges that the said George W. Ewell has no other claim of right to the land embraced in the said mortgage except through the deed of the said James B. Ewell, executed to him on the 9th Sept., 1856; that he is in possession of the said deed, and your orator prays that he may be compelled to produce the same, and if he shall fail to do so that complainant may be allowed to prove the same by a duly certified copy thereof; and complainant further alleges that the deed from Edward Dwyer and Mariana Dwyer, his wife, to James B. Ewell for the bond mentioned in the said original bill is also in the possession or under the control of the said George W. Ewell, and that the same constitutes a link in the chain of title to the land embraced in said mortgage, and which is claimed by the said George W. and your orator prays that the said George W. Ewell be compelled to produce the same, or on his default to do so that the complainant be allowed to prove the same on the hearing of a duly certified copy thereof from
43 the records of the county of Guadalupe aforesaid; and your orator says that the said defendant George W. Ewell sometimes pretends that the said James W. Ewell had no right or authority to take the deed to the said land in his own name from the said Edward & Mariana Dwyer, and that the said James W. paid nothing for said land to wards the consideration thereof, but that the entire consideration was paid by him to the said Dwyer & wife, which said pretence the complainant does not admit, but denies.

And complainant says that if the said pretence be true as stated, yet your orator avers that he is an innocent purchaser, for a valuable consideration, without notice so far the said mortgage is concerned.

That he advanced to the said James B. Ewell, at the time of the execution of the said mortgage, two thousand dollars in money as the consideration thereof, and took the note of the said James B. for three thousand four hundred and fifty-six dollars, payable thereafter, which said note has been sued upon and judgment rendered against the said James B. Ewell as aforesaid, and which said judgment and mortgage forms the basis of this suit.

And he avers that he had no notice of the claim of George W. Ewell to the said land ot the time of the loan of the said money to James B. Ewell; that the transaction was made in good faith, and was made under the belief that James B. Ewell had a perfect title to the said land, and had a right to sell the same; that at the time of the said advancing the
44 said money there was no evidence on the records of Guadalupe County of any claim of the said George W. to said land, and that if he had any claim to the same, or advanced any money towards the purchase thereof, he was guilty of laches in permitting the title to the said land to stand in the name of James B. Ewell for more than two years after the purchase from said Dwyer, and by reason of his said laches must be postponed to the claim of the complainant.

And sometime the defendant George W. Ewell pretends that the complainant has, by his laches in failing to bring a suit to foreclose the said

mortgage at an earlier day, lost his right to enforce the same as against the said land; but complainant says that the reason of his not bringing his suit to foreclose the said mortgage at an earlier day was not his fault, nor the fault of his agents or attorneys, but was from accident and the loss for the time being of the said mortgage; that he sued upon the said note James B. Ewell and his wife, the said Mary W., and obtained judgment thereon as against the said James B. only, because the said debt was a community debt between the said James B. and Mary W., and the said Mary W., being the wife of the said James B. at the time of executing the note and the trial of said cause, could not bind herself in that manner, wherefore the cause at law was dismissed as to her.

And sometimes the defendants John F. Smith and wife, Laura, and the infants Ida, Sallie, & Minnie Wilson pretend that the right to
45 foreclose the said mortgage as against them is barred and precluded by lapse of time; but claimant alleges that they have had no such possession of said land, if they have had any at all, as will create a bar to the said suit by the statute of limitations of the State of Texas. That at the time of the purchase by their ancestor of the portion of said land claimed by them, and at the time of the purchase by or conveyance to George W. Ewell, under whom they claim title, the said deed of mortgage herein mentioned had been made and executed, and was properly recorded in the records of Guadalupe County, in which said land is and was situated, and they had due notice thereof.

The premises considered, your orator prays as in the original bill, that an account be taken by and under the direction and decree of this honorable court of what is due and owing to your orator for principal and interest moneys upon and by virtue of his said vested mortgage security, and that said J. B. Ewell and Mary W. Ewell may be decreed to pay and satisfy your orator what shall appear to be due and owing on the taking the aforesaid account by a short day to be appointed by this honorable court, together with your orator's costs, and in default thereof the said J. B. Ewell and Mary W. Ewell, and all persons claiming under them or through them, may be absolutely barred and foreclosed as to any claim in and to said mortgaged premises and every part thereof, and may deliver over to your orator all deeds and writings in their custody, possession, or power relating to or concerning the said premises, and every part thereof.

46 And that the pretended deed of James B. Ewell to George W. Ewell may be found fraudulent and made with intent to hinder and delay creditors of James B. Ewell and be delivered up and cancelled; or if not so found, that the rights claimed by the said George W. Ewell, as well as the rights claimed by George Knight, and those claimed by John F. Smith and wife and Ida, Sallie, & Minnie Wilson be postponed to the right of your orator under the said mortgage.

And your orator prays that he may have such other and further relief as the nature of the case may require and to equity belongs.

May it please your honors to grant to your orator a writ of subpœna, directed to the said James B. Ewell and his wife, Mary W. Ewell, to George W. Ewell, John F. Smith and wife, Laura, and to the infants Ida, Sallie, and Minnie Wilson, and the said George Knight, commanding them, and each of them, at a certain time and under a certain penalty therein to be

limited, personally to be and appear before this honorable court, and then and there full, true, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

THOMAS J. DAGGS,
Complainant.

WALTON, GREEN & HILL,
Solicitors for Complainant.

On the same day, to wit, Sept. 23d, 1875, subpœnas issued to John
47 F. Smith, Mrs. Laura Smith, Ida, Minnie, & Sallie Wilson, of Travis County, Texas, and to George Knight, of Guadalupe Co., Texas, made defendants by the said amended bill.

The marshal's returns of service are endorsed on the original writs, to wit:

Subpœna for John F. Smith is endorsed by the marshal:

Came to hand Sept. 24, 1875. Served Oct. 4, 1875, by delivering to John F. Smith, in Travis Co., in my dist., in person, true copy of this subpœna in chancery.

THOMAS F. PURNELL,
U. S. Marshal, W. D. of Tex.,
Per H. P. PURNELL, *Deputy.*

Subpœna for Mrs. Laura Smith is endorsed:

Came to hand Sept. 24, 1875. Served Oct. 4, 1875, by delivering to the within named Mrs. Laura Smith, in Travis Co., in my dist., in person, a true copy of this subpœna in chancery.

THOS. F. PURNELL,
U. S. Marshal, W. D. of Tex.,
Per H. P. PURNELL, *Deputy.*

Subpœna for Ida Wilson (minor) is endorsed, to wit:

Came to hand Sept. 24, 1875. Served Oct. 4, 1875, by delivering to the within named Ida Wilson, in person, in Travis Co., in my dist., a true copy of this subpœna in chancery.

T. F. PURNELL,
U. S. Marshal.,
Per H. P. PURNELL, *Deputy.*

Subpœna for Sallie Wilson (minor) is endorsed, to wit:

Came to hand Sept. 24, 1875. by delivering to Ida Wilson, one of the members of the household of their guardian, J. F. Smith, for Sallie Wilson, a true copy of this subpœna in chancery.

T. F. PURNELL,
U. S. Marshal.,
Per H. P. PURNELL, *Dep.*

Subpœna for Minnie Wilson (minor) is endorsed, to wit:

Came to hand Sept. 24, 1875. Served Oct. 4, 1875, by delivering to the within named Minnie Wilson, in Travis Co., in my dist., in person, a true copy of this subpœna in chancery.

THOS. F. PURNELL,
U. S. Marshal.,
Per H. P. PURNELL, *Deputy.*

Subpœna for George Knight, of Guadalupe Co., is endorsed, to wit:
Rec'd Oct. 8, 1875, and executed the 16th day of Nov., 1875, by delivering to George Knight, in person, a true copy of this writ in chancery, No. 94.

THOS. F. PURNELL, *U. S. M.*,
By JOHN F. GORDON, *Deputy.*

48 On September 23d, 1875, the following waiver and agreement was filed and entered:

(Endorsed:) 94. Chancery. Thomas J. Daggs vs. J. B. Ewell & wife & others. Agreement waiving service, &c. Filed and entered rules Sept. 23, '75. M. Hopkins, clerk.
And is in words, to wit:

In chancery. In U. S. circuit court for western district of Texas, at Austin.

THOMAS J. DAGGS, COMPL'T,
vs.
JAMES B. EWELL & OTHERS, DEFENDANTS. } No. 94.

In the above case the defendants James B. Ewell & wife and George W. Ewell, by their solicitors, accept service of copy of the plaintiff's bill as amended and waive subpœna.
In consideration of which the time for answering same is extended till the first Monday in December next, and the answer over on overruling demurrer of George W. Ewell by the court is also extended till that time.

CARLETON & ROBERTSON,
Solicitors for J. B. & Mary W. Ewell.
JACKSON & JACKSON,
Solicitors for George W. Ewell.
WALTON, GREEN & HILL,
Sol's for Compl't.

October rules, 1875, the following entry appears:

THOS. J. DAGGS
vs.
JAMES B. EWELL ET ALS. } No. 94. Oct. 25, 1875.

Comes now Mrs. Laura Smith and John F. Smith, her husband, who is also guardian of Ida Wilson, Sallie Wilson, and Minnie Wilson, minors, by Sheeks & Sneed, their attorneys, and enter their appearance in this cause.

SHEEKS & SNEED,
Attorneys for L. & J. F. Smith.

the complainant or his agents any money or other valuable thing on the faith or credit of the said land.

And now this respondent having shown to your honor that he is
57 and ever has been a mere stranger to any and all dealings between the said complainant on the one part and the said James B. & Mary W. Ewell on the other part, he submits to your honor, and respectfully insists, that neither at law or in equity can he or his rights or property be prejudiced or affected by the said note or mortgage or by any judgment or other proceeding on the same heretofore had or taken thereupon.

This respondent explicitly and positively denies any and every charge, allegation, and imputation of fraud, collusion, concealment, or other covin whatsoever made against him by the complainant in his original and amended bills; and further denies that he is or has ever been guilty of any laches or negligence to the pre*d*judice of the complainant or his rights.

58 And now, by way of answer, this respondent pleads the statute of limitations of the State of Texas in bar of this suit, and shows to the court here that all suits, whether legal or equitable, founded upon contracts in writing are, and at the date of the making and maturity of said note and mortgage were, barred and precluded after four years from and subsequent to the accrual of the cause of action thereupon.

And respondent shows, by the allegations of the complainant's bill and by the said note and mortgage, that any and every cause of action which ever inured to the complainant by virtue of said note and mortgage accrued to him on or about the 30th day of May, A. D. 1859, and much more than four years prior to the institution of this suit on the 14th
59 day of January, A. D. 1875, wherefore this respondent insists that the complainant's cause of action (if any he ever had against respondent, which is denied) was barred before the commencement of this suit.

6. And respondent is advised and charges that if the complainant ever had any cause of action against him (which respondent denies) or ever had any right to subject the said land for the payment of said note (which respondent also denies) any such cause of action or such right has been lost to the complainant by his own neglect, laches, or default, or by the neglect, laches, or default of his own agents or attorneys and wholly without any wrong or default upon the part of this respondent. And respondent therefore submits to the court and insists that as against him and his property the complainant's said bill and the matter hereby set up
60 is a "stale demand," and constitutes no cause of action against respondent.

7. Respondent wholly denies (as he has hitherto done) that the land described in the complainant's bill is or ever was the property of said James B. and Mary W. Ewell, or either of them, or that they, or either of them, ever had the right or authority to mortgage to the complainant, or to any other person, or in any manner to exercise any control over the same. And, more explicitly, this respondent wholly denies the charge in said bill that said James B. Ewell purchased the said land during the marriage between the said James B. and Mary W. Ewell. On the contrary thereof, respondent states and charges the fact to be that the said land was
61 never purchased or in any manner acquired by the said James B.

Ewell; but that this respondent, in the years 1853 or 1854, purchased the said land from the said Edward Dwyer, and that he, this respondent, paid the said Dwyer for the same out of this respondent's own funds, and that no part of the purchase-money paid therefore was or ever had been the property of the said James B. & Mary W. Ewell, or either of them; nor had they, or either of them, any manner, or right, or interest either in the said land or the consideration therefor paid by this respondent.

Respondent does not personally know why the said Dwyer and wife made conveyance of said land to the said James B. Ewell, but states positively that it was not so made with respondent's knowledge or consent, or by his authority; but long after respondent's purchase of said
62 land he learned the fact that the conveyance had been made to said James B. Ewell, and thereupon he demanded and received from the said James B. Ewell a conveyance of said land to himself, which conveyance respondent supposes to be the same instrument referred to by complainant in his original bill. Respondent is advised and charges that it was his clear and unquestionable right to demand and receive the said conveyance from the said James B. Ewell; and he now again states that when he did receive the same he had no knowledge and no notice or information that the said James B. Ewell had attempted to mortgage the said land to the complainant; nor had he any knowledge, notice, or information that the said James B. Ewell was indebted to the complainant. And
63 respondent emphatically denies any and every allegation and pretence in complainant's bill that he obtained such conveyance for the purpose or with the intent to hinder, delay, or defraud the complainant or any other creditor of said James B. and Mary W. Ewell, or of either of them, in the enforcement or collection of any debt or demand against or from the said James B. & Mary W. Ewell, or either of them. Respondent's only purpose and intent in obtaining said conveyance was to procure the proper evidence of his title to his own property.

And respondent states that on the 27th day of May, 1856 (the date of the note and mortgage executed to complainant by said James B. and wife), he, respondent, was in total ignorance that any deed or conveyance
64 of said land had been made to said James B. Ewell, or that there was ever an ostensible right in said James B. to deal with the said land in any respect whatever.

8. Further answering, this respondent does not admit, but on his information and belief denies that the said James B. Ewell & Mary W. Ewell, or either of them, obtained from the complainant, or from the complainant's agents or attorney, upon the faith of a mortgage of said land the sum of money mentioned in the bill, or any sum of money. Respondent is informed and believes that the loan of money by complainant to said James B. & Mary W. Ewell was effected through agents of the complainant, named Houston & Allen, who were entrusted by the complainant with the power and duty of accepting from said James B. & Mary
65 W. Ewell security for such loan, and that said Houston & Allen, as such agents, accepted the said mortgage from them as a mere temporary security; but further respondent is informed and believes, and so charges the fact to be, that when said Houston and Allen accepted or received said mortgage they were well apprised of the fact that the said

land was the property of this respondent, and that the said James B. & Mary W. Ewell had no right or interest therein; and further on information and belief respondent states and charges that it was expressly understood by and between the said James B. Ewell on the one hand and said Houston & Allen, as agents as aforesaid, on the other, that the said mortgage was executed for a temporary purpose only until said James B. should have time to perfect his title to certain other land, upon which he
66 should execute a mortgage as security for the said loan, or until said James B. should otherwise secure the said loan to the satisfaction of said Houston & Allen, as agents of the complainant; and respondent charges that the acceptance of a mortgage upon his land under these circumstances was a fraud upon him, and that such mortgage constitutes no charge upon him or his property. Respondent is advised that complainant himself is chargeable with the notice and knowledge which his said agents had of the fact that the said land was the property of this respondent, and not the property of said James B. and Mary W. Ewell, or either of them; and respondent charges that the sale of his land under or by virtue of a mortgage so taken would be flagrantly unjust and inequitable.

9. Respondent positively denies the charge which is indirectly
67 made in complainant's (2nd) amended bill filed September 25th, 1875, to the effect that respondent purchased the said land from the said James B. Ewell. On the contrary, respondent never purchased said land from said James B., nor any part thereof, nor did respondent in any manner recognize, admit, or acknowledge that the said James B. Ewell ever had any ownership of or interest in the said land; nor did he ever have any dealings with the said James B. Ewell in respect of said land other than to take from him a proper conveyance for the same, so as to place the paper title in this respondent, as it should have been placed by said Dwyer, from whom he purchased the said land.

10. Respondent admits that in the year 1873 he placed George
68 Knight in possession of so much of said land as respondent had not previously sold to J. P. Wilson, but respondent denies the charge in complainant's (2nd) amended bill, to the effect that he did so with "a view of harras'ing complainant & hindering him from making his said mortgage from James B. Ewell and wife available for the satisfaction of the debt," &c. On the contrary, when respondent placed said Knight in possession of said land he, respondent, had no knowledge, information, or notice of any purpose of the complainant to file this bill, or to institute any proceedings against this respondent or his said land. Respondent denies any and all "concert" with said Knight, or with any other person, to injure or wrong the complainant in any respect; but says that it
69 was his clear legal right to place said Knight in possession, and his contract or agreement with said Knight is to the effect, or in substance as follows: "S'd Knight desiring to become the purchaser of a portion, at least, of my Vincinte Durand tract or body of land lying on the Cibola River, in Guadalupe Co., feeling himself unable pecuniarily to make a cash payment, as required, proposed that I lease a tract for the space of two years, hoping by that time to be able to comply with my terms of sale & thereby secure a home; which was accepted and agreed to by me, & accordingly entered into a written agreement in consideration of

such lease & purchase, privilege to perform certain labor in building houses, clearing land, protecting my timber from trespass. For particulars refer to article of agreement in the hands of Col. Goodrich, Siquine, Gaudalupe Co.

70 And now having fully answered, respondent prays to be dismissed with his reasonable costs.

GEO. W. EWELL,
Defendant.

W. E. GOODRICH,
JACKSON & JACKSON,
Sol's.

THE STATE OF TEXAS,
Harrison County:

On this the 23d day of November, A. D. 1875, before the undersigned authority, personally came Geo. W. Ewell, one of the defendants in the above-entitled cause of Thos. J. Daggs vs. James B. Ewell & others, and who is personally known to me, who being by me duly sworn, deposes and says that the matter set forth and stated in the foregoing answer, so far as stated of his own knowledge, are true, and so far as stated on his information and belief he believes them to be true.

GEO. W. EWELL.

71 Sworn to and subscribed before me, the day and year above written.

T. W. STEOMAN,
U. S. Commisioner for the Western District of Texas.

(Endorsed:) No. 94. Chancery. Thomas J. Daggs vs. James B. Ewell & als. Amended answer of George W. Ewell. Filed Dec. 6, 1875. M. Hopkins, cl'k. W. E. Goodrich, Jackson & Jackson, sol's for G. W. Ewell.

On the 3d day of January, 1876, the following agreement was filed. Endorsed: Filed January 3d, 1876. M. Hopkins, cl'k.
In words, to wit:

UNITED STATES OF AMERICA,
The State of Texas, Western District, at Austin:

THOMAS J. DAGGS
vs.
JOHN F. SMITH ET ALS. } No. 94.

It is agreed that John F. Smith may have until the 17th January, 1876, to file answers for himself, his wife, and the minors, Ida Wilson, Sallie Wilson, and Minnie Wilson, for whom he is guardian, in the above-entitled cause.

WALTON, GREEN & HILL,
Solicitors for Compl't.

72 And afterwards, the answer of John F. Smith and the heirs of

J. B. Wilson dec'd was filed. Endorsed. Filed January 17, 1876. M. Hopkins, clerk.

And is in words, to wit:

Answer of John F. Smith and heirs of J. B. Wilson. Filed January 17, 1876. *M. Hopkins. Clerk.*

THE UNITED STATES OF AMERICA,
The State of Texas, Western District, at Austin, ss:

In the United States circuit court. In chancery.

JOHN F. SMITH AND OTHERS *ats.* THOMAS J. DAGGS. } No. 94.

Answer of John F. Smith for himself, his wife, Laura Smith, and the minors, Ada, Sallie, and Minnie Wilson.

The defendants, John F. Smith, and Laura Smith, his wife, by said John F. Smith, her husband, and the minor defendants, Ida Wilson, Sallie Wilson, and Minnie Wilson, by said John F. Smith, their guardian, now and at all times hereafter, reserving all manner of benefit and advantage to themselves of exception to the many errors and insufficiencies in said bill contained, for answer thereunto, or unto so much thereof as these defendants are advized is material for them to make answer unto, they answer, and say, that the said Laura Smith, Ada Wilson, Sallie Wilson, and Minnie Wilson, as the only heirs of J. B. Wilson, deceased, and as such are the owners in fee-simple of the said 555½ acres of land which was conveyed by deed to said J. B. Wilson by said George W. Ewell, as is alleged in complainant's bill; that the contract between said George W. Ewell and said James B. Wilson, by which said Wilson became the purchaser of said 555½ acres of land, they believe was made about the 4th day of
73 December, 1855; that the deed from said Ewell to said Wilson for said land bears date March 1st, 1857, and they are informed and believe, and on such information & belief charge the truth to be that the said Wilson purchased such land in good faith, and paid therefor a valuable consideration, to wit, the sum of $3,500, all of which was paid on or before the said 1st day of March, 1857; that the following is a correct description of said 555½ acres of land as the same appears from the said deed, to wit: "All that certain tract or parcel of land situate in the county of Guadalupe, in the State of Texas, on the Cibola River, being a portion of survey No. 45, known as the Vicente Duran tract, beginning at a stake on the bank of the Cibola at the southwest corner of Mrs. Tarver's survey, which is the northwest corner of this survey, from which a hackberry 13 inches in diameter, bears S. 25° E. 36 varas, a musquite 16 inches in dia., bears S. 27 W. 10 varas, and a hackberry, 9 inches in di., bears S. 80 E., 11 varas; thence N. 61 E. 6,205 varas, with the south boundary line of Mrs. Tarver's survey to a post oak, 12 inches in di., from which a post oak b'rs N. 85 W. 14 varas, and another post oak, 12 inches in di., bears S. 15 W. 10 varas; thence south 29 E. $499\frac{3}{10}$ varas to a stake to be *sit* for the southeast corner of this survey; thence S. 61 W. to a stake to be set on the east bank of the Cibola for the southwest corner; thence up said

river with its meanders to the place of beginning, containing five hundred and fifty-five and a half acres," being the same land described by a bond executed by said George W. Ewell, attested by T. G. Pierce and B. E. Rhodes, dated December 4th, 1855; which land they are informed and believe, and upon such information and belief they charge the truth
74 to be, the said James B. Wilson, for a valuable consideration, conveyed by deed, on the 8th day of July, 1858, to John C. Wilson, who, on the 28th day of October, 1859, conveyed the same to James B. Wilson, who on the 14th day of November, 1865, conveyed the same to James N. Thompson, who on the 9th day of February, 1869, conveyed the same to James B. Wilson, who is now dead, all of which conveyances were by deed, and for valuable and sufficient consideration; wherefore they aver that the said James B. Wilson was, at the time of his death, the owner in fee-simple of said land; that he was a bona fide purchaser of the same in good faith, for a valuable consideration; and that they, the said Laura Smith, Ida Wilson, Sallie Wilson, and Minnie Wilson, are the legal and only heirs of said J. B. Wilson, the said Laura Smith, and the said Ida, Sallie, and Minnie Wilson, minors as aforesaid, being his children, and as such heirs, and now owners in fee-simple of said 555½ acres of land, or of whatever interest or right said James B. Wilson had therein.

And they further aver that they are informed, and from such information and belief cha'ge the truth to be, that said J. B. Wilson, deceased, made and entered into a contract of purchase for said land on the 4th day of December, 1855, with the said George W. Ewell, and in pursuance of said contract of purchase, with the consent of said George W. Ewell, went into possession of said land during said year of 1855, and remained in possession of the same continuously from that time until the month of November, 1858, and made valuable improvements on the same, and was in possession of the same at the time of the alleged execution of the original note and mortgage mentioned in said bill, to wit, on the 27th
75 day of May, 1856. They say that they do not know whether the said J. B. Wilson, deceased, had at that time made payment to the said G. W. Ewell for the land or not; but they ask that the court permit them to make such proof as they may be able to make, to show the equities that really existed in favor of the said J. B. Wilson, as a purchaser of said land at the date of the execution of said note and mortgage; and they say that they are informed and believe that the said George W. Ewell was, on the 6th day of December, 1855, the equitable owner of the said land in such bill described, including the 555½ acres claimed by the said heirs of J. B. Wilson, deceased, and that said J. B. Ewell only had the legal title to the same 555½ acres in trust for the said J. B. Wilson, as is shown by the amended answer of George W. Ewell, filed herein on the 6th day of Dec., 1875; and without being able to state that said answer is true or untrue, because they are without certain and positive information in regard to the same, they say they believe the same, so far as it sets up a trust in favor of G. W. Ewell in the lands of the said J. B. Ewell, to be true, and they therefore ask to be permitted to adopt, and they do here adopt said answer as their own, and ask for all benefits that they may be entitled to under the same; and they further aver that the said J. B. Wilson being in possession of the said 555½ acres of land as a purchaser from and under the said George W. Ewell at the time the said note and mort-

gage were executed, to wit, on the 27th day of May, 1856, the petitioner was chargeable with notice of his equities, and if said mortgage and note were so executed, the pretended lien created by the same
76 was junior to the equities of the said J. B. Wilson, and that the complainant ought not to have his remedies as prayed for as against these defendants.

They further say that they are informed and believe, and from such information and belief charge the truth to be, that in the month of November, 1858, the said J. B. Wilson, deceased, delivered the possession of said land to said John C. Wilson, to whom he had conveyed the same, as is hereinbefore stated; that said J. C. Wilson remained in possession of said land for one year, when he delivered the possession of the same again to J. B. Wilson, to whom he had reconveyed it; that the said J. B. Wilson, and the persons to whom he had conveyed the same, paid, or caused to be paid, all the taxes on said land until the year 1867; that on the 19th day of February, 1867, the said J. B. Wilson departed this life, since which time the heirs of said J. B. Wilson have caused the taxes thereon to be paid until the present time regularly, and they aver that the possession of said land by said heirs of J. B. Wilson, deceased, together with that of said J. B. Wilson, before his death and that of the said J. C. Wilson and James N. Thompson, to whom he had conveyed the same, and who reconveyed the land to him, had been continued, peac'able and uninterrupted, from some time in the year 1855, and such possession has been under deed and accompanied with the payment of all taxes on the same ever since the first day of March, 1857.

And they further aver that they are informed and believe, and from such information and belief charge the truth to be, that the said com-
77 plainant ought not to have the relief granted him for which he prays as against these defendants, because they say that his cause of action, if aught he has, did not accrue within the four years last passed immediately prior to the institution of this suit against them, and that his claim is therefore a stale demand, and should be adjudged to be barred by the statute of limitations by this court.

And said defendants, further answering, say that the' know nothing of the truth or falsity of any of the allegations in said bill and amended and supplemental bills contained, on which said complainant bases his claim to recover herein, and they therefore ask that he be held to strict proof of the same.

But they say that if the same are true, which is not admitted, and it should be found that the equities as hereinbefore claimed by these defendants, under the said J. B. Wilson, are not well founded, then they say that the said J. B. Wilson was a purchaser in good faith as hereinbefore stated, and that the said complainant should be required to sell all of the entire tract of land described in said bill, except the 555½ acres claimed by them, before he sell' the said 555½ acres so claimed by these defendants. And the said John F. Smith, for himself, says that he knows nothing of his own knowledge of the matters and things alleged in complainant's bill and amended bill, and that he has no interest in the same except such as is disclosed in the foregoing answer.

Wherefore, believing all of the allegations in this answer to be

78 true, they ask to be discharged and permitted to go hence, with judgment for their costs, &c.

J. F. SMITH,
For Himself & Wife and for said Minors.

SHEEKS & SNEED, *Att'ys.*

THE UNITED STATES OF AMERICA,
The State of Texas, Western District, ss:

On this 17th day of January, 1876, before me personally came the above-named John F. Smith, and made oath that he has read the foregoing answer subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are stated to be on information and belief, and that as to those matters he believes it to be true.

J. F. SMITH.

Sworn to and subscribed before me this 17th January, 1876.
M. HOPKINS, *Clk.*

And afterwards, at March rules, 1876, the following entry appears upon the rule or order book:

THOMAS J. DAGGS *vs.* J. B. EWELL ET AL. } Chancery. No. 94. March 6, 1876.

Now, on this day came the complainant, by his solicitors, and files their replication to the answers of the defendants herein.

M. HOPKINS, *Clerk.*

Replication endorsed, to wit: 94. Thomas J. Daggs vs. J. B. Ewell et al. Replication. Filed March 6, 1876. M. Hopkins, cl'k.

79 And is in words, to wit:

Replication.

In chancery. In U. S. circuit court for west'n district Texas, at Austin.

THOMAS J. DAGGS *vs.* JAMES B. EWELL & WIFE, MARY W., GEORGE W. Ewell, John F. Smith & wife, Laura, & Ida, Sallie, & Minnie Wilson, minors. } No. 94.

This repliant, saving and reserving to himself all and all manner of advantage and exception to the manifold insufficiencies of said answers, in replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants are uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answers contained material or effectual in the

law to be replied unto, confessed, and avoided, traversed, or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

WALTON, GREEN & HILL,
Sol. for Complainants.

On the 12th day of October, 1877, the following agreement was filed. Endorsed to wit: Ch'y. No. 94. U. S. circuit court. Thomas J. Daggs vs. James B. Ewell & wife, Geo. W. Ewell, et al. Agreement as to
80 evidence. Filed Oct. 12, 1877. M. Hopkins, cl'k. Which agreement as to evidence is in words to wit:

In chancery. In the circuit court of the U. States for western district of Texas.

THOMAS J. DAGGS *vs.* J. B. EWELL & WIFE, GEORGE W. EWELL, & John F. Smith, et al.	94. Filed Oct. 12, 1877. M. Hopkins, cl'k.

In this case it is agreed by and between the parties by their solicitors that the evidence of witnesses needed by either party may be taken by notice of interrogatory to the opposite party, and cross-interrogatories to same, and may be taken and returned into court, in accordance with the practice of the district court of the State of Texas.

The depositions to be taken before and returned by the officers (or any of them) mentioned in section 863 of the Revised Statutes of the United States, copy of this agreement being sent with the said interrogatories as authority for the officer, commissions to take the same being waived. But depositions may also be taken in any other manner allowed by the laws of the United States applicable to courts of equity.

It is further agreed that the evidence thus taken and returned, shall remain of file in the circuit court of the United States aforesaid, and shall be read in evidence subject to objections for irregularities in the mode of taking and return, and objections for immaterality and incompetency of the evidence.

WALTON, GREEN & HILL,
Sol's for Comp't.
JACKSON & JACKSON,
Sol's for G. W. Ewell.
SHECKS & SNEED,
For J. F. Smith et al.

(Indorsed:) Proceedings. Daggs v. Ewell, down to testimony.

81 STATE OF TEXAS,
County of Bexar:

Whereas we, James B. Ewell, and Mary W. Ewell, his wife, of the county of Bexar and State of Texas, are justly indebted to Thomas J. Daggs, of the county of Alleghany and State of Virginia, in the sum of three thousand four hundred and fifty-six dollars ($3,456.00), evidenced

by our promissory note to said Thomas J. Daggs, of this date, due and payable on the 27th day of May, A. D. one thousand eight hundred and fifty-nine (1859), and being desirous to secure to the said Thomas J. Daggs the payment of the said sum of three thousand four hundred and fifty-six dollars as aforesaid, we have this day granted, bargained, sold, released, and conveyed, and do by these presents, grant, bargain, sell, release and convey unto the said Thomas J. Daggs, his heirs and assigns, a certian trust or parcel of land lying and being in the county of Guadalupe and State of Texas, and bounded as follows, to wit:

Beginning at a stake on the bank of the Cibola Creek, at the upper corner of survey No. 6, and the lower corner of the original survey, from which a musquite, 12 in. dia., bears S. 61½° W., 4 varas; another musquite 12 in. dia., bears N. 81° E., 25 varas; thence N., 61° E., 6,710 v'as to a stake, from which a post oak, 40 in. dia., bears N. 87° W., 2 v'as, and a post oak, 14 in. dia., bears N. 15° W. 17 v's, this being the southeast corner of the original survey; thence N. 29° W. 1,539 v's
82 to a post oak, 12 in. dia., from which another post oak bears N. 85° W. 14 v's; and another post oak, 12 in. dia., bears S. 15 W. 10 v's, thence S. 61° W. 6,205 v's to a stake on the east bank of the Cibola Creek, from which a hackberry, 13 in. dia., bears S. 25° E. 36 v's; and a musquite, 16 in. dia., bears south 27° W. 10 v's and a hackberry, 9 in. dia., bears S. 80° E. 11 v's; thence down said stream with its meanders to the beginning, containing sixteen hundred and fifty-three acres of land, and a portion of surveys No. 4 and 5, known as the Vicente Duran tract, being the same conveyed to Jas. B. Ewell, by Edward Dwyer, and Mariana Dwyer, his wife, by deed bearing date 1st April, A. D. 1854, together with all and singular the rights, members, hereditaments, and appurtenances to the same belonging, or in any wise incident or appertaining: To have and to hold all and singular the premises above-mentioned, unto the said Thomas J. Daggs, his heirs and assigns forever, and we, the said Jas. B. Ewell, and Mary W. Ewell, his wife, do hereby bind ourselves, &c., to warrant and forever defend all and singular the said premises unto the said Thomas J. Daggs, his heirs and assigns, against all persons lawfully claiming or to claim the same.

Nevertheless it is expressly understood and agreed between the parties hereto, that this conveyance is only designed to operate as a mortgage, and is to be void so soon as the said Thomas B. Ewell and Mary W.
83 Ewell, his wife, shall pay or cause to be paid to the said Thomas J. Daggs, the said sum of three thousand four hundred and fifty-six dollars as aforesaid, otherwise to remain in full force and effect. In testimony whereof, we have hereto signed our names and affixed our seals, using scrolls for seals, at the city of San Antonio, this twenty-seventh day of May, A. D. 1856.

J. B. EWELL. [SEAL.]
MARY W. EWELL. [SEAL.]

Signed, sealed, and delivered in presence of—
J. T. ALLEN.
JNO. D. MCLEOD.

STATE OF TEXAS,
County of Bexar:

Before me, John D. McLeod, chief justice & ex officio notary public in

and for the county and State aforesaid, personally appeared J. B. Ewell, to me well known, who acknowledged that he had signed, sealed (using scroll for seal), and delivered the within mortgage in writing for the purposes & consideration therein stated and expressed. At the same time personally appeared Mary W. Ewell, wife of J. B. Ewell, parties to a certain mortgage in writing, bearing date on the twenty-seventh day of May, A. D. 1856, in the reverse hereof, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Mary W. Ewell, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed (using scrool for seal), and delivered the same, and that she wished not to retract it.

84 To certify which I hereto sign my name and affix the impression of my official seal at office in the city of San Antonio, this the 27th day of May, A. D. 1856.

[SEAL.] JNO. D. McLEOD,
Chief Justice & Ex officio Notary Public, Bexar Co.

Filed in my office for registration the 31st day of May, A. D. 1856, at 6 o'clock p. m.

J. W. CUMMINGS,
C. C. C. G. C.
By WM. A. PITTS,
Deputy.

THE STATE OF TEXAS,
Guadalupe County:

I, J. W. Cummings, clerk of the county court in and for said county, do hereby certify that the foregoing instrument of writing attached hereto with its certificate of authentication was filed in my office for registration the 31st day of May, A. D. 1856, at 6 o'clock, p. m., and duly recorded the 3d day of June, A. D. 1856, at 9 o'clock p. m., in the records of said county, in book F, on pages 660, 661, & 662.

In testimony whereof I hereunto sign my name and affix the impress of my official seal at office in Seguin this the 5th day of June, A. D. 1856.

J. W. CUMMINGS,
C. C. C. G. C.
By WM. A. PITTS,
Dep'ty.

85 *Petition in law, case* 1254, *offered in evidence in chan'y case No.* 94.

Filed by order of Hon. Thos. H. Duval, acting as circuit judge this 9th day of March, A. D. 1872.

M. HOPKINS, *Clk.*

L. 1254.

To the judges of the circuit court for the western district of Texas:

The petition of Thomas J. Daggs, of the county of , in the State of Virginia, against J. B. Ewell and his wife Mary W. Ewell, residents of Henderson County, in the State of Texas, sheweth, that the said Thomas J. Daggs is a citizen of the State of Virginia, and the defendants, J. B.

Ewell, and his wife Mary W. Ewell, are citizens of Texas, within your honors' jurisdiction, to wit, the county of Limestone, west. dist. of Texas; that heretofore, to wit. on the 27th day of May, 1856, the said defendants at San Antonio, in the State of Texas, made, executed, and delivered to your petitioner, their certain promissory note by which for value received they promised to pay to your petitioner, three years after the date thereof, the sum of three thousand four hundred and fifty-six dollars, by means of which they became bound to pay the said sum of money when the same should fall due according to its tenor and effect. And petitioner alleges that the said note has long since been due and payable, and that though the defendants have been often requested to pay said note, yet to pay the same or any part thereof, they have hitherto failed and refused, and still refuse to the damage of petitioner five thousand dollars; wherefore he
86 brings his suit and prays for citation to the defendants to make them parties hereto, and upon a hearing he prays for judgment for his said debt, damages, and cost, and for such further judgment as may be necessary, &c.

WALTON & GREEN,
Att'ys for Pl'ff.

By leave of the court plaintiff amends by alleging that he is still the owner and holder of the note above described.

WALTON & GREEN,
Att'ys for Pl'ff.

And afterwards the following judgment appears on the minutes of the court.

Judgment in law case No. 1254, *offered in evidence in chanc'y case No.* 94.

THOMAS J. DAGGS
vs. } No. 1254.
JAMES B. EWELL.

JULY 15, 1873.

In this cause now comes the plaintiff by his attorney, and dismisses his said cause as against Mary W. Ewell, the wife of the defendant, James B. Ewell.

And thereupon, said cause coming on, the said plaintiff as well as the defendant, James B. Ewell, by their attorneys, announced themselves ready for trial, and waiving a jury the matters involved in said cause were submitted to the court both as respects the issues of law as well as of fact, and the court after hearing the argument of counsel, doth order and adjudge that the demurrer of the defendant be overruled, and upon the evidence submitted the court doth find that the said defendant is indebted to the plaintiff in the sum of three thousand five hundred and thirty $\frac{95}{100}$
87 dollars, together with twelve per cent. per annum interest from this date.

It is therefore ordered and adjudged that the said plaintiff do have and recover against the said defendant, James B. Ewell, the said sum of three thousand five hundred and thirty $\frac{95}{100}$ dollars, bearing twelve per

centum per annum interest, together with all costs in this behalf expended, for which execution will issue.

No. 1254. On the 12th day of August, A. D. 1873, execution issued. The marshal's return upon this is endorsed to wit:

"I return this execution January 5th, A. D. 1874, by order of John Ireland, without selling the property levied on by virtue of this *fi fa.*, and return it by order said Ireland, he being one of att'ys of record, without further proceedings thereon.

"THOS. F. PURNELL, *U. S. M.*,
"By JOHN F. GORDON, *Deputy.*"

The execution shows levy on the Vicente Duran tract described in the levy as "being the same conveyed to Jas. B. Ewell by Edward Dwyer and Marian Dwyer, his wife, by deed bearing date 13th April, A. D. 1854, levied on as the property of J. B. Ewell to satisfy this execution hereto annexed and in the foregoing styled cause September 8th, A. D. 1873.

"THOS. F. PURNELL,
"*U. S. Marshal,*
"By JOHN F. GORDON, *Dep'y.*"

88 *Deposition of Thomas J. Daggs.*

In chancery In the circuit court of the U. States for the western dist. of Texas.

THOMAS J. DAGGS
vs.
J. B. EWELL & WIFE, GEORGE W. EWELL, & John F. Smith, et al.

In this case it is agreed by and between the parties, by their solicitors, the evidence of witnesses needed by either party may be taken by notice of interrogatories to the opposite party and cross-interrogatory to same, and may be taken and returned into court in accordance with the practice of the district court of the State of Texas. The depositions to be taken before and returned by the officers (or any of them) mentioned in section 863 of the Revised Statutes of the United States, copy of this agreement being sent with the said interrogatories as authority for the officer—commissions to take the same being waived, but depositions may also be taken in any other manner allowed by the laws of the United States applicable to courts of equity.

It is further agreed, that the evidence thus taken and returned shall remain of file in the circuit court of the United States aforesaid and shall be read in evidence, subject to objections for irregularities in the mode of taking and return, and objections for immateriality and incompetency of the evidence.

WALTON, GREEN & HILL,
Sol's for Compl't.
JACKSON & JACKSON,
Sol's for Geo. W. Ewell.
SHECKS & SNEED,
For John F. Smith et al.

89 In chancery. In U. S. circuit court at Austin, Texas.

THOMAS J. DAGGS, COMPL'T,
vs.
JAMES B. & MARY W. EWELL, GEORGE W. EWELL, & JOHN F. SMITH, et al., def'ts. } 94.

To the defendants or their attorneys of record, W. E. Goodrich, & Jackson & Jackson, and Sheck & Sneed:

You will please take notice that we will apply for commission to take the answers of Thomas J. Daggs, of Alleghany County, in the State of Virginia, to the following interrogatories propounded by the plaintiff, to be read in evidence for the plaintiff in the above-styled cause. You can, if you choose, propound cross-interrogatories.

WALTON, GREEN & HILL,
Solicitors for Compl't.

Interrog'tory 1. Are you the complainant in the above-styled cause? Are you the same person who was the plaintiff in case No. on the law side of the docket of the circuit court of the United States for the western district of Texas, and who recovered in said court on the 14th day of July, 1873, a judgment against James B. Ewell for the sum of three thousand five hundred and thirty $\frac{95}{100}$ dollars; and, if yea, state whether the James B. Ewell there mentioned is the same person who is a defendant in this bill?

Interrogatory 2. What was the consideration of the said judg-
90 ment; that is, upon what character of claim was it rendered? Describe the same, and state all you know of its origin; what payments had been made on the claim, and whether the payments made were understood at the time they were made to have been on account of the interest accrued or upon the payment of the debt; that is, state whether the understanding was not at the time of the respective payments that the interest which had accrued was first to be extinguished.

Interrogatory 3d. State who took the note for you, and whether you were present. State what amounts were paid, and to whom paid, and when. State what amounts, if any, were paid on the principal, and what amounts on the interest accrued.

Interrogatory 4th. If you say you did not take the note, but it was taken by an agent, what occurred between you and the defendant James B. Ewell afterwards with regard to the interest; and in the correspondence between you and James B. Ewell, or in conversations with him, what amount of interest was the contract to bear? When and under what circumstances did this occur? What amount of interest did you recover in the judgment in the U. States circuit court upon the contract with James B. Ewell?

Interrogatory 5. Was there any mortgage made by James B. Ewell, or James B. Ewell & wife, to secure the note aforesaid? Upon what property was said mortgage placed? Who took the mortgage for you,
91 and were you present?

Interrogatory 6. If you say you had such mortgage enquired of, and describe the property, and state it was taken by an agent, please state

whether you had not seen and conversed with James B. Ewell before, and when it was, about the security you was to get. State if you know whether the said Ewell referred to the land embraced in said mortgage. Did he say, or not, anything about the title to it? If yea, what did he say? Did he give you any information about it being bought with the money of any other person, and it belonging equitably to such person? If he did, what did he say, and what person did he mention?

Interrogatory 7. When did you first hear or know of any claim to the property in controversy made by the defendant, George W. Ewell?

Interrogatory 8. If you have any letters or memoranda from James B. Ewell in reference to the claim of title by the said Ewell to the said land, at or before the time when the mortgage was executed, please attach the same to your answer to this interrogatory.

Interrogatory 9. State all you know about the good or bad faith exercised by you or your agents in taking the mortgage as security for the loan of the money mentioned to James B. Ewell.

92 Interrogatory 10. What representation did James B. Ewell make to you as to the condition of his property, and what property he had to induce you to let him have the money? When, if ever, did he give you information that he had bought property for George W. Ewell, & had taken the deed in his own name? What do you know, if anything, about George W. Ewell's and James B. Ewell's transactions between each other, especially about this land? Where was George W. Ewell living at the date of the mortgage, and long before and afterwards, and where was James B. Ewell living at that time? What did James B. Ewell want with the money he got from you?

Interrogatory 11. Do you know anything about the mortgage upon the said property for the loan of your money being temporary, and that it was to be afterwards substituted? If you do, state it; what property was to be substituted for it, if any; and if any, state why it was to be substituted, and if it was not done, state why it was not done.

Last interrogatory. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties in this cause, or either of them, or that may be material to the subject of this your examination, or the matter in question in this cause? If yea, set forth the same fully and at large in your answer.

WALTON, GREEN & HILL,
Solicitors for Compl't.

We acknowledge service of the within notice and interrogatories, and waive time.

JACKSON & JACKSON,
For G. W. Ewell.
SHECKS & SNEED,
Att'ys for Smith, Guardian, &c.

SEPT. 27, 1877.

93 DAGGS
vs.
EWELL ET ALS. } No. 94. Chancery.

Cross-interrogatories to Thomas J. Daggs, propounded in favor of George W. Ewell, one of the defendants.

X-int. 1. Among the files of the United States circuit court at Austin, Texas, in chancery, there is a case, No. 64, styled Thomas J. Daggs vs. James B. Ewell and Mary W. Ewell, and among the papers of that suit there is a deposition of Thomas J. Daggs taken May 23d, 1873, before John R. Pharr, clerk of the county court of Alleghany County, Virginia; are you the person who made that deposition?

X-int. 2. How many of the payments made upon the note sued upon were made to you in person or in your presence? Where not all of them except one made to your agent? Do you know what passed between your agents and J. B. Ewell when he made such payments to them?

X-int. 3. Do you know what did or did not pass between your agents and said James B. Ewell in regard to the security given or to be given by him for the note in question? Where you ever present at any conference or interview between him and your agents? If not, is not all your acquaintance with what transpired between them derived purely from information?

94 X-int. 4. Did George W. Ewell ever authorize you or your agents to accept from James B. Ewell a mortgage or pledge of said land? If he did, state when, where, and who was present.

(This defendant objects to the last clause in plaintiff's 2nd interrogatory to this witness, because the same is leading; and will also object to any answer made on the witness's knowledge, or which are made by him on information derived from others, because hearsay.

JACKSON & JACKSON,
Sol's for G. W. Ewell.

STATE OF VIRGINIA,
County of Botetourt, ss:

By the authority of the agréement of counsel hereto attached and intert rogatories accompanying the same, which are also hereto attached, in the case of Thomas J. Daggs versus J. B. Ewell & wife, George W. Ewell, and John F. Smith, et al, now pending in the circuit court of the United States for the western district of Texas, I caused to come before me at the residence of John J. Allen, in Botetourt County, Virginia, the witness Thomas J. Daggs, named in the notice hereto attached, a resideut of Alleghany County, Virginia, who being by me duly sworn to speak the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories in said case propounded to him, proceeded to answer the same as follows:

95 Answer to 1st interrogatory. I am the complainant in this cause.

I am the same Thomas J. Daggs who recovered a judgment in the circuit court of the United States for the western district of Texas, on the 14th day of July, 1873, for $3,530.95, against James B. Ewell, who is one of the defendants in this cause.

Ans. to 2d interrogatory. The judgment was recovered on a note given by James B. Ewell to myself, for the sum of $3,456.00, dated May 27th, 1856, and due three years after date. This note was given for the loan of $2,000, which was negotiated for me by John J. Allen, attorney at law and solicitor, then residing in the city of San Antonio, Texas, and was secured by mortgage on a tract of land in the county of Guadalupe, State of Texas. Four payments have been made on said note, three of which were made to my agent and attorney, John W. Allen, amounting, in the aggregate, to $1,300.00; the fourth payment was made to me in person in January, 1866, amounting to $400.00, the whole aggregating $1,700.00. There was no understanding between myself and Mr. Ewell as to whether the payments made were to go to the extinguishment of the accrued interest or the reduction of the principal of the debt. I presume, however, and always intended that the payments were to be first applied to the accrued
96 interest, and I expected my agent to so apply collections made by him. I have always regarded that as the proper and legal way of applying payments on debts, in the absence of any other special agreements in reference thereto.

Ans. to 3d interrogatory. My agent and attorney, John J. Allen, took the note for me. I was not present. During the year 1859 Mr. Allen sent me at various times the sum of $1,300.00. I received $400.00, as above stated, in January, 1866. My understanding was and is that the whole amount paid was upon the accrued interest.

Ans. to interrogatory 4th. I wrote to Mr. James B. Ewell, informing him that 12 % was the interest that I expected to get from him; besides I told him in person, in the city of San Antonio, that 12 % was the amount that I intended to exact. This was after the execution of the mortgage note. I am not prepared to say what amount of interest I recovered in the judgment in the U. S. circuit court, above alluded to. I never knew.

Ans. to 5th interrogatory. I am informed there was a mortgage obtained by John J. Allen, my agent and attorney, upon lands in Guadalupe County, Texas, to secure the note. I cannot give a more definite description of the property. My agent, J. J. Allen, took the mortgage for me. I was not present.

97 Answer to interrogatory 6th. I had seen and conversed with James B. Ewell in the spring of 1856, before the loan was effected & secured. He may at that time have understood that he was to give a mortgage for the whole amount of all the money I was to loan to him upon his home property in Bexar County, but before leaving San Antonio I left the matter with my agent and attorney, J. J. Allen, with instructions that he was to see that I was amply secured. He did not consider the home property, subject as it was to the homestead exemption, ample security for the whole amount of the proposed loan. He therefore demanded other security, and placed half of the sum upon this land in Guadalupe County, secured by mortgage. Mr. Ewell wrote, requesting me to have this mortgage released, and the whole am't placed upon the home place, which he claimed was in accordance with the agreement between us. But I left the matter in the hands of my attorney and agent, J. J. Allen, and he declined to make any such arrangement. The contract between Mr. Ewell and myself was that he should give me ample security for my money, and I neve' assented to any arrangement by which I was to take a mortgage upon his

home place for the whole amount of the loan if it was not considered ample security by my agent and attorney. Before Mr. Ewell received my letter, as he afterwards informed me, he concluded to let the matter stand,
98 and applied to my attorney, J. J. Allen, for the balance of the money yet remaining in his hands, to secure which he executed a mortgage upon his home place in Bexar County. I do not know whether Mr. Ewell, in his consultations with me prior to the loan, referred to the land embraced in said mortgage—I mean the land in Guadalupe County. I do not know that he said anything about the title to it. He never gave me any information about its having been bought with the money of any other person, or that it belonged equitably to any other person.

Answer to interrogatory 7th. I never heard of any claim to the property in controversy made by the def't, Geo. W. Ewell, until after this suit was brought. I never heard before or knew that there was such a person as Geo. W. Ewell.

Ans. to interrogatory 8th. I have no letters or memoranda at or before the time the mortgage was executed.

Ans. to interrogatory 9th. All the transactions in reference to the loaning or securing the money was, as far as I or my agent & attorney are concerned, in perfect good faith.

Answer to interrogatory 10th. He represented to me that he had ample security, and could secure the loan well upon lands; he spoke of his home place as security, but when I saw my attorney I left with the understanding that he was to take additional security if he thought it necessary.
99 I left the whole matter in his hands. He never informed me that he had bought property for Geo. W. Ewell and had it deeded in his own name. I know nothing whatever about James B. Ewell's & George W. Ewell's transactions with each other in reference to this land or anything else. I never heard of George W. Ewell until this suit was brought. James B. Ewell was living at Oak Hill, in the county of Bexar, on the waters of the Martinez, 15 or 20 miles east of San Antonio. I don't know, unless it was to improve his property or to pay his debts. He put up a cotton mill and mill there.

Answer to interrogatory 11th. I do not know anything as to the mortgage being temporary, and to be afterwards substituted by other property.

Answer to interrogatory 12th. I don't know that I can state anything that will be of advantage to the parties to this suit, or either of them, or that may be material to the subject of this my examination, or the matters in question in this case.

Cross-interrogatories:

Answer to X-interrogatory 1st. I am the person who made the deposition alluded to in this X-interrogatory.

Answer to X-interrogatory 2d. Only one made in my presence,
100 which was made to me in person. All were made, except one, to my agent. I was not present, and do not know what occurred between my agent and J. B. Ewell.

Answer to X-interrogatory 3d. I was not present when the note was executed, and do not know what occurred between James B. Ewell and my agents. I was never present at any conversation between him & my agent. All I know is derived from letters from James B. Ewell and information from and representations by my agent.

Ans. to X-interrogatory 4th. I never saw George W. Ewell, nor did I ever receive any communication from him on this or any other subject.

And further this deponent saith not.

THOMAS J. DAGGS.

Sworn to and subscribed before me, at the residence of John J. Allen, in Botetout County, State of Virginia, on this 14th day of November, 1877.

I do hereby certify that I am not of counsel or attorney to either of the parties to this cause, and that I am not interested in the result of said cause.

In witness of all of which I have hereto set my hand and official seal this 14th day of November, 1877.

[SEAL.] T. J. GODWIN,
Notary Public for Botetourt County, State of Virginia.

Fee for taking deposition, $5.00; paid by T. J. Daggs.

101 The deposition of John J. Allen, taken by the same officer at the same place as those of Thomas I. Daggs, and sealed in the same envelope. The clerk omits copying the agreement under which the deposition is taken, being verbatum with the agreement attached to the interrogatories to Thos. J. Daggs.

Deposition of J. J. Allen.

In chancery. In the U. S. circuirt court for western dist. of Texas, at Austin.

THOMAS J. DAGGS
versus
JAMES B. EWELL & MARY W. EWELL, George W. Ewell & John F. Smith et al. } No. 94.

To the defendants, or their solicitors, W. E. Goodrich, & Jackson and Jackson, and Sheeks and Sneed:

You are hereby notified that we will apply for a commission to take the answers of J. J. Allen, of Botetout County, Virginia, to the following interrogatories propounded by complainant, to be read as evidence on the trial of the above-named cause as evidence for complainant. You will propound cross-interrogatories if you so desire.

WALTON, GREEN & HILL.

Int. 1. Where do you reside, and say if you are acquainted with the parties to this suit, or any of them, and which?

Inter. 2. Did you ever reside in Texas; if so, where, and at what place, and how long did you reside there; what was your business or occupation, and who was associated with you at that time?

102 Int. 3. Were you ever acquainted with the defendants James B. and Mary W. Ewell; if yea, where did they then reside, what means, if any, or what property did they have in their possession, and state what property the said James B. Ewell had?

Interrogatory 4. Were you acquainted with the defendant George W. Ewell; if yea, when and where did you see him? If you saw him in Texas, state what he was engaged in, or what business he had in Texas.

Interrogatory 5. Did you ever have any business transactions for the complainant, Thos. J. Daggs, with James B. Ewell, or said Ewell & wife, Mary W.; what transactions did you have, and when, and state the circumstances under which the said business transactions occurred?

Interrogatory 6. If you loaned any money for Thomas J. Daggs to James B. Ewell, or said Ewell & wife, state how much it was, when was it loaned, and what security did you take for Daggs? If there were any notes executed, please state who signed them, and who were present.

Interrogatory 7. Please look upon the paper purporting to be a mortgage made by J. B. Ewell and his wife, Mary W. Ewell, to Thomas J. Daggs, dated 27th May, 1856, and say what you know about it; state whether the J. J. Allen who signs the same as a witness is identical with yourself, and say whether you signed the same as a witness at the
103 request of the grantors; state what you know about the signing and delivery of the mortgage by the grantors, and attach the mortgage to your answer to this interrogatory, identifying in some proper method.

Interrogatory 8. What do you know of the consideration of said mortgage. If you say it was to secure the loan of money, state if it was evidenced by a note. If it was evidenced by a note, state how much had been paid upon the note, to whom, and at what times; and if you state you received payments, what understanding there was as to what the payments should apply, whether first to interest accrued or the principal sum.

Interrogatory 9. Was Thomas J. Daggs present when the note and mortgage was executed, and in this answer state who were present. To whom was the note and mortgage delivered?

Interrogatory 10. In whose name did the property mentioned in the said mortgage as security appear at the time the mortgage was taken; what knowledge or information, if any, did you, or whoever acted for said Daggs, or did the said Daggs have, at the time of the taking thereof, that James B. Ewell did not own the land, and what knowledge or information had you or they that George W. Ewell had bought the land and paid for it with his own money or means? State all information you or any other person acting for Mr. Daggs, or Mr. Daggs himself had, if any, resulting trust in the said land in favor of George W. Ewell, at the time the
104 money was loaned to James B. Ewell and the mortgage on the land as security therefor was executed. State all you know about the good faith of the transaction.

Interrogatory 11. The defendant George W. Ewell, in his answer in this case alleges that the loan of money heretofore mentioned by Thomas J. Daggs was effected through Houston and Allen his agents, who were charged with taking security therefor, and that said Houston, & Allen, as such agents, accepted the said mortgage from James B. Ewell & wife as a mere temporary security, and he further, in his answer, charges, upon information and belief, that when said Houston & Allen accepted or received said the *said* mortgage, they were well apprised of the fact that the said land was the property of this respondent (George W. Ewell), and that the said James

B. Ewell and Mary W. Ewell had no right or interest therein." It is further charged in the answer of the said George W. Ewell, upon information and belief, "That it was expressly understood by and between the said James B. Ewell, on the one hand, and the said Houston & Allen, agents as aforesaid, on the other, that the said mortgage was executed for a temporary purpose only, until the said James B. should have time to perfect his title to certain other land, upon which he should execute a mortgage as security for the said loan, or until the said James B. should
105 otherwise secure said loan to the satisfaction of said Houston & Allen, as agents of the complainant." Please state what you know of the truth or falsity of the charges aforesaid, and state fully the circumstances of the whole transaction, showing whether the same was made in good or bad faith towards the defendant George W. Ewell.

Interrogatory 12. What other security, if any, did the said James B. Ewell ever offer or pretend that he had, except the land mentioned in the above-mentioned mortgage, and certain other land subsequently mortgaged for another and different loan. State fully all that occurred between said James B. Ewell and Houston & Allen in reference to the loan of the money upon the above-mentioned mortgage of the 1,653 acres of the Vicente Duran land in Guadalupe County.

Last interrogatory. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this case. If yea, set forth the same fully and at large in your answer.

WALTON, GREEN & HILL,
Sol. for Complainant.

106 DAGGS
vs.
EWELL & ALS. } No. 94. Chancery.

Cross-interrogatories to J. J. Allen, propounded in favor of George W. Ewell, one of defendants.

X-int. 1. What is the full name of your partner, or associate in this business of the plaintiff, Daggs, and is he living or dead? If living, state where.

X-int. 2. How much money was received by James B. Ewell in consideration of the note for $3,456.00, dated May 27th, 1856, payable three years after date to plaintiff, Daggs? If you say $2,000.00, then give the reason why said note was not drawn for $2,000.00, with a stipulation to pay the rate of interest agreed upon by the parties? Was not the note taken in its present form in order to cover up or evade the statute of the State of Texas, in force in 1856, prohibiting the taking of a greater rate of interest than 12 per cent. per annum, and forfeiting all interest when a greater rate was stipulated for?

X-int. 3. Were not you and your partner practicing lawyers in Texas when said note was made, and also when the payments on it were made? If so, did you not, at the dates of said note and payments, know the statutory law of Texas in relation to interest and usury?

X-int. 4. Were you not acquainted with Edward Dwyer in his lifetime?

Did not you or your partner acquire from him or from other source
107 the information that the land referred to in plaintiff's interrogatories had been sold by said Dwyer to a different person than James B. Ewell?

X-int. 5. Were there not negotiations between James B. Ewell and you (or your firm) with reference to other or different security than said land, to be provided by him for said loan?

X-int. 6. Were not you and your firm, in 1856 and subsequently, engaged in an extensive and miscellaneous law land agency, and general practice; and, if so, can you now undertake, after the lapse of so many years, to detail the particulars which then transpired in an ordinary transaction which then passed through your hands?

X-int. 7. Did you or your firm ever have any conference or correspondence, or negotiation of any kind, with the defendant George W. Ewell, in regard to the said note and mortgage?

X-int. 8. Was not the plaintiff, Daggs, at or before the date of said note, apprized that a greater rate of interest than 12 per cent. per annum was unlawful in Texas?

JACKSON & JACKSON,
Sol's for Def't G. W. Ewell.

Direct interrogatories indorsed, to wit:

"We acknowledge service of the within notice & interrogatories, and waive time.

"Sept. 27, 1877.

"JACKSON & JACKSON,
"*For G. W. Ewell,*
"SHEEKS & SNEED,
"*Atty's for Smith, Guardian & al.*"

108 STATE OF VIRGINIA,
County of Botetourt, ss:

By the authority of the agreement of counsel hereto attached and interrogatories accompanying the same, which are also hereto attached, in the case of Thomas J. Daggs versus J. B. Ewell & wife, Geo. W. Ewell and John F. Smith et al., now pending in the circuit court of the United States for the western district of Texas, I cause to come before me at the residence of John J. Allen, in Botetourt County, Virginia, the witness John J. Allen, named in the notice hereto attached, a resident of said county of Botetourt, who being by me duly sworn to speak the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories in said case propounded to him, proceeded to answer the same as follows:

Answer to first interrogatory. I reside in Botetourt County, State of Virginia, and am acquainted with Thomas J. Daggs, the complainant, and James B. Ewell, one of the defendants. I have met with Mrs. Mary W. Ewell, but my acquaintance with her is very slight. I do not know George W. Ewell and John F. Smith. If I ever met with either of them, I have now no recollection of the fact.

Ans. to 2d interrogatory. I did reside in the city of San Antonio, Texas, from March, 1855, to April, 1861.

109 I was a practising lawyer. William Y. Houston was associated

with me in the practice of law from some time during the summer of 1855 until I left the State in 1861.

Ans. to interrogatory 3d. I was acquainted with defendant James B. Ewell, and slightly acquainted with Mrs. Mary W. Ewell. They resided at a place called Oak Hill, on the waters of the Martinez, between 15 and 20 miles of the city of San Antonio. James B. Ewell was reputed to be a man of property, the reputed owner of large tracts of land, negroes, and other property.

Ans. to interrogatory 4th. I do not recollect ever having met George W. Ewell, or having any acquaintance with him; I do not know what he was engaged in or what business he had in Texas, as I have no recollection whatever of the man.

Ans. to i'terrogatory 5th. In May, 1856, as the agent and attorney for Thos. J. Daggs, I loaned J. B. Ewell two thousand dollars, taking as security therefor a mortgage deed on a tract of land in the county of Guadalupe, which mortgage deed was executed to the said Thos. J. Daggs by James B. Ewell and his wife, Mary W. Ewell. Some time in the spring of 1856, Mr. Thomas J. Daggs, who was then on a visit to Texas,
110 called at my office in San Antonio and stated that he had agreed to lend to Mr. James B. Ewell a certain sum of money; that he would, on his return to his home, in Virginia, send to me the money, and requested me to see that it was properly secured by Mr. James B. Ewell. In other words, Mr. Daggs employed me as his agent and attorney to attend to this business for him.

Ans. to interrogatory 6th. As above stated I loaned to James B. Ewell, for Thomas J. Daggs, two thousand dollars in May, 1856. In June, or July, 1856, I loaned to James B. Ewell, two thousand dollars for Thomas J. Daggs, taking, as well as I recollect, a mortgage deed signedb y Ewell & wife, as security for above loan, on his home tract in the county of Bexar. Notes were taken and signed by James B. Ewell, and my recollection is, by Mary W. Ewell, his wife. I do not recollect who were present at the time.

Ans. to interrogatory 7th. I have not got the original or a copy of the mortgage alluded to in this interrogatory. I presume it is the mortgage alluded to by me in my answer to the 5th interrogatory. I presume, also, that if it is signed by J. J. Allen, as a witness. I am the party, and that I did so sign at the request of the grantors. The mortgage alluded to in my answer to the 5th interrogatory, which I presume to be the same alluded to in interrogatory 7th, was signed by James B. Ewell, and Mary W. Ewell, and delivered to me as the agent and attorney of Thomas J. Daggs.

111 Answer to interrogatory 8th. The mortgage of May, 1856, I cannot fix the exact date, was to secure the loan of money, and was evidenced by a note. I have just discovered, by reference to my books, that this mortgage & note were executed May 27th, 1856. On the last day of February, 1859, Mr. J. B. Ewell paid me, for Mr. Daggs, eight hundred dollars on his note due May 27th, 1859. The latter portion of April or the 1st of May, 1859, James B. Ewell, paid me two hundred dollars, which credit I presume is indorsed on note dated the 27th of May, 1856. On the 3d day of November, 1859, James B. Ewell paid me, for Mr. Daggs, three hundred dollars, which I presume is also credited on above-mentiond note, as of that date. These payments, viz, $800.00, $200.00, and $300.00, making a total of $1,300.00, paid me for Mr. Daggs, should all have been

applied to the note dated May 27th, 1856, as it was the oldest note. I do not recollect that there was any understanding in reference as to how these payments should be applied, whether to the principal or to the interest. I am satisfied that they were applied to the payment of the interest, for I would not have received the money, as the agent and attorney of Mr. Daggs, with the understanding that the payments were to be applied to the principal, rather than to the interest that had accrued. As well as I now recollect nothing whatever was said in reference to the application of these
112 sums, but I am sure that if Mr. Ewell ever proposed the application of the payments to the principal sum, I would not have for a moment entertained such a proposition. To bear me out in this I have referred to my letter-book and have refreshed my recollection by such reference. During the year 1860, and the early portion of 1861, I was constantly urging Mr. Ewell to give me new notes for the interest then due; he stated that he was willing to do so, but that Mr. Daggs had agreed that he should have the money at a lower rate of interest than I was demanding, and that he would wait until he heard from Mr. Daggs.

Ans. to interrogatory 9th. Mr. Daggs was not present when the note and mortgage were executed. I do not recollect who were present besides Mr. James B. Ewell and myself. The note and mortgage were delivered to me.

Ans. to interrogatory 10th. As well as I recollect, the property mortgaged under date of May 27th, 1856, was in the name of James B. Ewell. I acted in the matter for Thomas J. Daggs. I had no information or knowledge that James B. Ewell did not own the land; had I had any such knowledge or information I certainly would never have taken a mortgage upon it. As far as I am advized, Mr. Daggs knew nothing of the matter. I had no knowledge or information that George W. Ewell had bought the land, that he had ever paid for it with his own money or
113 means, or for any portion of it. As far as I am advized, Mr. Daggs, like myself, had no such knowledge or information. I knew nothing of any resulting trust in said land in favor of George W. Ewell, neither did Mr. Daggs, as far as I am advized, have any such information. I did not at the time said mortgage and note were executed, and not until now, as far as I recollect, have I ever had any such knowledge or information. The good faith of this transaction was perfect, Mr. Ewell stating that he would not offer a title that there was any doubt about; repeatedly assuring me that the title was perfect, and that he was the owner of the land.

Ans. to interrogatory 11th. The charges of the defendant Geo. W. Ewell, in his answer in this case, as quoted in the 11th interrogatory, are as far as they allege that the mortgage from Jas. B. Ewell and wife was accepted by myself or by Houston & Allen as a mere temporary security, and that they were apprized of the fact that the said land was the property of the defendant Geo. W. Ewell, and that said James B. Ewell and Mary W. Ewell had no right or interest therein, and that it was expressly understood by and between the s'd James B. Ewell, on the one hand, and the said Houston & Allen, agents as aforesaid, on the other, that the said mortgage was executed for a temporary purpose only until the said Jas. B. Ewell should have time to perfect his title to cer-

114 tain other lands upon which he should execute a mortgage as security for the said loan, or until the said Jas. B. Ewell should otherwise secure said loan to the satisfaction of said Houston and Allen, as agents of the complainant, are false and utterly without foundation. I have, in my answers to the preceding interrogatories, stated pretty fully the circumstances of the whole transaction. It was made, as I have stated, in perfect good faith between all of the parties engaged in it, as far as I knew. Mr. George W. Ewell was not known in the transaction; neither do I recollect of ever having heard of such party until I see his name mentioned in connection with these transactions in the interrogatories.

Ans. to interrogatory 12th. James B. Ewell never offered or pretended that he had any other security except the land mentioned for the loan secured by this mortgage. He had other property upon which I at first insisted he should give me a lien in addition to the land mortgaged. I recollect of asking him for a mortgage upon his negroes, and perhaps other property. This he declined to do, &, upon a reference of the matter to Mr. Daggs, he instructed me to accept the mortgages as they were afterwards executed. Upon reflection, I will correct what is above stated. It was upon the second or July mortgage upon his home place, as well as I remember, that I at first demanded a mortgage upon his negroes

115 also, as he was entitled to a homestead in this property.

Answer to interrogatory 13th. I do not know that I can set forth any other matters or things which may be a benefit or advantage to the parties in this case, or either of them, or material to the subject of my examination or the matters in question in this case.

Answers to cross-interrogatories:

Answer to 1st cross-interrogatory. My associate & partner in the practice of law in the city of San Antonio, Texas, was William Y. Houston. He is now dead; killed in the fall of 1862. Mr. Houston & myself formed our partnership in the summer or fall of 1855, expecting at the time that it would be a mere temporary arrangement. Mr. Daggs came to me individually, and I transacted all of his business in my own individual name. Mr. Houston really had nothing to do with these transactions between Mr. Daggs and Mr. Ewell.

Ans. to 2nd X-interrogatory. Mr. Ewell received two thousand dollars for the note for $3,456.00, dated May 27th, 1856, and payable three years after date to Thomas J. Daggs. The note was drawn for the sum of $3,456.00 for the reason, if not paid at maturity, the who' am't would then bear interest. The note had a long time to run; in the event

116 of Mr. Ewell's death before its maturity, if given in the way indicated in the interrogatory, Mr. Daggs would only have received interest on the sum of $2,000.00 after its maturity and until its payment by Mr. Ewell's representative. The note was not taken in its present form to avoid the statute of usury. It would certainly have been a very shallow device if such had been the intention.

Ans. to 3d X-interrogatory. Mr. Houston, my partner, and myself were practicing lawyers in Texas when said note was made, and also when the payments on it were made. I presume we knew the statutory law of Texas in relation to interest and usury.

Ans. to 4th X-interrogatory. I do not know to whom this interrogatory alludes when I am asked if we were not acquainted with Edward Dwyer in his lifetime. There was a Mr. Dwyer, a man of prominen'e & wealth, in the city of San Antonio, had died a short time, I think, before I went there. I do not know whether his first name was Edward or not, nor am I certain as to the time of his death. Neither Mr. Houston, as far as I am advized, nor myself ever acquired from him or from any other source the information that the land referred to in plaintiff's interrogatories had been sold by said Dwyer to a different person than James B. Ewell.

117 Ans. to 5th X-interrogatory. I do not recollect any negotiations between James B. Ewell & myself, or with my partner or firm, with reference to other or different security than said land to be provided by him for said loan. At all events none were ever effected in reference to this matter.

Ans. to 6th X-interrogatory. Our firm, in 1856, and especially thereafter, was engaged in an extensive and miscellaneous law, land agency, and general practice. I do undertake to detail the particulars in reference to these transactions as I have detailed them in my answers to these interrogatories. I have refreshed my memory in many particulars by reference to my letter book, account book, and other papers which I still have in my possession bearing upon these transactions.

Ans. to 7th X-interrogatory. Neither myself or my firm ever had any correspondence or conference or negotiation of any kind with the defendant George W. Ewell in regard to said note and mortgage, as far as I recollect. As I have stated, I have no recollection whatsoever of Mr. George W. Ewell, and if I ever knew any such party, or ever heard of him until now, or ever had any correspondence or negotiation with him in reference to this matter or any other matter it has wholly and entirely escaped me.

118 Ans. to 8th X-interrogatory. I presume Mr. Thomas J. Daggs is more competent to testify as to his knowledge & information than I am. I do not know whether he was so apprized by myself or not, nor do I recollect whether he ever sought the information from me.

And further this deponent saith not.

JOHN J. ALLEN.

Sworn to and subscribed before me at the residence of John J. Allen, in Botetourt County, State of Virginia, on this 14th day of November, 1877.

I do hereby certify that I am not of counsel or attorney to either of the parties to this cause, and that I am not interested in the result of said cause.

In witness of all of which I have hereto set my hand and official seal this 14th day of November, 1877.

T. J. GODWIN, [SEAL.]
Notary Public for Botetourt County, State of Virginia

Fee for taking deposition, $5.00; paid by T. J. Daggs.

119 This is letter A, filed with the answer of Thos. J. Daggs to 10th interrogatory.

JOHN R. PHARR, *Clerk.*

Filed in law case 1254, & admitted as testimony in this case.

LOUISVILLE, *June 30th*, 1866.

J. F. DAGGS, Esq.:

D'R SIR: Your favour came to hand in due season, and gave us much pleasure to hear of your safe arrival at home & also that you were successful in your business in Baltimore.

I have been putting off writing to you in answer to yours, hoping I would be able to give you some cheering news, but I am sorry to say the longer I put it off the more low-spirited I get, and everything becomes more discouraging. In my last letter from Capt. Tevis he had lost the most of the horses from crossing high water; was detained at the Trinity River some three weeks from high water; Trinity River 10 miles wide, & finally crossed with great loss; also lost at the Colorado & Brazos Rivers; Dr. Hawkins also met with great loss—in fact, all who have driven. The seasons in Texas very fine, & crops as good *as good* as could be. I judge from what the capt. says he has not over 100 animals left, & that it will about take them to pay expenses; don't you think that was a consoling letter to me; they traded all the cattle off for $200, 4 horses, & 3 mules—worse & worse. Now, for what I have done—well, sir, up to this time I have done nothing but spend what little money I had, though I tell you
I have exerted my utmost; I have been all over the West nearly,
120 Chicago, & all around, & not a machine or right has been sold by
Mr. Miller or myself yet, & we are of the blankest-looking fellows you ever saw. I have not entirely given it up yet, because there is no better machine known to the public.

But having nothing to go on now, I'm looking for some business to go into. I feel like I have gone up entirely, but it is not worth while to cry after spilt milk (as the saying is), but to exert myself to the utmost for the future. I am still in hopes, as I have had so much bad luck that it will change after a while; we are all in the enjoyment of good health; my own health is good, but I never was so low-spirited in my life. I wish we had settled our business in some way when you were out in Texas, for it wearies me night & day. I hope I may come out better than I think for, but I can't see that I have anything but my land, & that I do not call mine by any means. My wife, as you must judge (knowing her as you do) is pretty low down; she & the children send kindest regards to you. I am boarding in a private family very cheaply; have not sent my children to school yet. Write to me as often as you can. I am a poor correspondent in my present situation & state of mind.

Believe me, as ever, your friend & well wisher,

J. B. EWELL.

121 This is letter B, filed with the answer of Thos. J. Daggs, to the 10th int'ry.

JOHN R. PHARR, *Clerk*.

Filed in law case 1254, & admitted as testimony in this case.

MISSOURI, NEAR MACON CITY, *October 9th*, 1866.

THOS. J. DAGGS, ESQ.:

MY DEAR FRIEND: I wrote you some three months ago, but as yet have rec'v'd no answer from you. I cannot account for it, as I directed

your letter according to address given me by you, but hope you may receive this in due time.

My friend, since we last parted, things have gone rough. We have had good health, for which I feel thankful, very thankful. In our trip to K'y we had good luck as could be expected. I then went to work on the machine to get it up so as to do good work, & thought I had succeeded, but as yet have been unable to sell a single machine or a single right. I had but barely means sufficient to bring us to K'y, by all the economy I could bring to bear. The am't due me from gov. I expended in getting up machines. It is gone & all a failure. I then turned to look for my horses. I have found what is left here, but was not prepared for the actual condition of things. They started with 183 head, all they could. They have lost horses all the way out, & are now dicing at the rate of two a day. The miserable remnant on hand, some of which have to be helped up every morning, I have advised them to sell for whatever they can get for them. They have the distemper, or something that kills, no matter what it is. The sales will not pay the expenses of
122 the trip. The cattle were swopped off for horses, & they are all in the same category.

In a word, my friend, I am without any money, but, with good health, can make a living for my family. My farm in Texas is yours, & I want you take it in hand as soon as possible, or it will be attached for some money I am owing there.

This is letter B, filed with the answer of Tho' J. Daggs to 10th interrogatory.

JOHN R. PHARR, *Clerk.*

I neither means to pay taxes upon it or to work it. I have the offer of a clerkship in L., but can't say yet that I will go back there. I am now looking out for something that I can engage in to make a living. Write to me at Louisville, care Anderson, McCampbell & Co., & if I am not there it will be forwarded to me. The change is a sad one to my family. Unexpectedly, I have slipped up on every point. I will do the best I can, & live in hopes for the best. Some one else will get the land if you don't take it, & I want to do all I can towards paying you.

Your unfaithful friend,

J. B. EWELL.

123 This is letter C, filed with the answer of Thos. J. Daggs to int. 10.

JOHN R. PHARR, *Clerk.*

Filed in law case 1254, and admitted as testimony in this case.

BALTIMORE CO., *July 3d*, 1867.

THOS. J. DAGGS, Esq'r.:

D'R SIR: I re'c'v'd yours of and would answered long ago, but have been waiting to see if anything in my affairs would change for the better, hoping to be able to do something for you, but alas, all is gone. I have nothing to-day but the tract of land in Texas; all is gone. First, every cent I got for the horses driven to Mo., was $200.00. My cattle were

sold and the money used to drive the horses; nearly all horses died. The voucher of $1,600.00 on the gov. I left with Webb, Arbuckle & Co. for collection, (merchants of San Antonio). They collected the money, failed, and are seventy-five thousand dollars worse than nothing all from Mr. Leigh' neglect. The farm in Texas is rented this year, which I hope to get to buy meat and bread with. I have nothing, no, not a cent. I have worked ever since I left Texas, trying to introduce the machine, but can do nothing, have not sold a single machine nor any territory, and I have tried my best. Oh, if I could have only foreseen this before breaking up. I have a shop in this co., and am trying to make (myself) a few machines so that I can put in some wheat this fall in partnership with some one who has the land. I never in my life before gave up, but it seems everything goes against me.

124 Though it is the last we have in this world, my wife is willing to join me in a deed to you of the farm; at the same time she says she would like to have the house and a small piece of the land, so she would have a home, but that is as you say.

If my health holds out I hope to make enough to live upon, though I have not done it this year. I hope you are doing well. Let me hear from you soon. I have the promise this fall of a situation as traveling agent for an establishment here. My wife family will go to her sister's in Texas. Write to me, 19 McCullough street, & my sister will send it to me, if I should be gone off before it arrives.

Yours truly, &c.,

J. B. EWELL.

125 Deed from J. B. Ewell to G. W. Ewell is indorsed, to wit, J. B. Ewell to G. W. Ewell. Deed. Filed for record the 10th day of September, A. D. 1856, at 9 o'clock a. m.

J. L. CALVERT, *Clerk.*

Original tract, 2,342; Tarver, 1,000; 1,342; Wilson, 555; 787; excess of land, 555; Cibola tract, 1,342 acres; recording fees, $ .90.

And is in words, to wit:

THE STATE OF TEXAS,
County of Bexar:

Know all men by these presents that I, J. B. Ewell, of the county of Bexar, State of Texas, in consideration of four thousand nine hundred and fifty-four dollars, to me paid by G. W. Ewell, of the county of Marshall, State of Texas, have granted, bargained, and sold, and by these presents do grant, bargain, & sell, unto the said G. W. Ewell eighteen hundred & thirty-eight acres of land, lying and being situate in the county of Guadalupe, State of Texas, on the Cibola, being a portion of survey No. 4 & 5, known as the Vicente Duran tract. Beginning at a stake on the bank of the Cibolo, at the upper corner of survey No. 6 and the lower corner of the original survey, from which a musquite 12 inches in dia. bears S. 61½° W. 4 varas; another musquite 12 in dia., bears N.

126 81° E. 25 varas; thence N. 61° E. 6,710 varas to a stake, from which a post oak 40 inches in diameter bears N. 87° W. 2 varas, & a post oak 14 inches in diameter bears N. 15° W. 17 varas, this being

the S. E. corner of the original survey; thence N. 29° W. 1,539 varas to a post oak 12 inches in diameter, from which another post oak bears N. 85° W. 14 varas, and another post oak 12 inches in dia. S. 15° W. 10 varas; thence S. 61° W. 6,205 varas to a stake on the east bank of the Cibolo, from which a hackberry 13 inches in dia. bears S. 25° E. 36 varas, a musquite 16 inches in dia. bears S. 27° W. 10 varas, and a hackberry 9 inches in dia. bears S. 80° E. 11 varas; thence down said stream with its meanders to the placé of beginning, together with all and singular the rights, members, hereditaments, and appurtenances to the same belonging or in any wise incident or appertaining; to have and to hold all and singular the premises above mentioned unto the said G. W. Ewell, his heirs and assigns forever.

Witness my hand and seal (using scroll for seal) this sixth day September, A. D. 1856.

J. B. EWELL. [SEAL.]

In presence of—
A. C. ODELL.
J. G. HUNTON.

THE STATE OF TEXAS,
County of Bexar:

Before me, Sam. S. Smith, clerk of the county court of said county, personally appeared A. C. Odell, to me known, who being by me
127 duly sworn, upon oath, saith that J. B. Ewell in his presence signed, sealed, and delivered the above and foregoing instrument of writing, and that he declared the same to be his act and deed for the purposes and considerations therein stated; and that he, deponent, together with J. G. Hunton, signed the same as witnesses, at the request of the said J. B. Ewell.

In testimony whereof I have hereunto signed my name and affixed the seal of the county court of Bexar County, at office in San Antonio, this sixth day of September, A. D. 1856.

[SEAL.] SAM. S. SMITH,
Clk C. C. B. Co.

THE STATE OF TEXAS,
County of Guadalupe:

I, J. L. Calvert, clerk of the county court of said county, do certify that the foregoing deed, with its certificate of authentication, was filed in my office for registration on the 10th day of September, A. D. 1856, at 9 o'clock a. m., and recorded the same day in deed book F, pages 791 & 792.

In testimony whereof I hereunto sign my name and affix the impress of my official seal, at office in Seguin, this 10th day of September, 1856.

[SEAL.] J. L. CALVERT, *Clerk.*

128 Deposition of George W. Ewell is indorsed, to wit, Thomas J. Daggs, plaintiff, vs. J. B. Ewell & wife, George W. Ewell, & John F. Smith, et als., defendants. Rec'd from p. office at Austin, & filed Dec. 8, 1877. M. Hopkins, cl'k. Opened by consent April 14, 1879. M. Hopkins, cl'k.

Received this package from the hands of C. H. McGill, notary public, the officer before whom the enclosed depositions were taken, to be forwarded as directed, by due course of mail, to Matthew Hopkins, clerk U. S. circuit court, Austin, State of Texas, this the 7th day of December, A. D. 1877.

J. D. McADOO,
Postmaster at Marshall, Texas.

The agreement under which these depositions were taken, dated Oct. 12, 1877, is attached to the depositions, and is literally the same as recited in the deposition of James B. Ewell.

In chancery. In the U. S. circuit court for 5th circuit & western district of Texas.

THOMAS J. DAGGS
vs.
J. B. EWELL, MARY W. EWELL, GEORGE W. EWELL, JOHN F. SMITH, and others. } No. 94.

Interrogatories to be propounded to George W. Ewell, a resident of Dallas County, in said district, and a witness for the defendants, George W. Ewell, John F. Smith, Laura Smith, and Ida, Sallie, and Minnie Wilson.

129 The plaintiff and his solicitors, Walton, Green & Hill, will take notice that the answers of said witness to the following interrogatories will be read in evidence for defendants on the trial of said cause, and can cross-interrogate, &c.:

Interrogatory 1. State whether you are the same George W. Ewell who is one of the defendants in the above-entitled cause, or a different man of the same name; and if you are the defendant of this name, then state whether or not you are apprized of the nature and object of this suit?

Int. 2. When, if ever, did you first acquire any knowlege, information, or actual notice of a certain promissory note for some $3,456.00, and a certain mortgage to secure the said note, executed May 27th, 1856, by James B. Ewell and his wife, Mary W. Ewell, to Thomas J. Daggs.

Int. 3. The said mortgage purports to encumber a tract of 1,653 acres of land in Guadalupe County, Texas, known as the Vincente Duran tract, alleged to have been conveyed April 13th, 1854, to James B. Ewell, by Edward Dwyer and wife. State whether you knew the said Edward Dwyer in his lifetime; and *and* if you knew of a sale having been made by him of the said tract of land state when the same was made; to whom it was made; whether he was ever paid for said land; if so, by whom, and with whose money he was paid therefor; and what interest in or portion of the said purchase-money was owned by the said James B. Ewell and wife, or either of them.

130 Int. 4. If you have answered that said land was purchased by you from said Dwyer, and was paid for by you, with your own money, state what authority, if any, you gave to them to make, or to James B. Ewell to receive, a deed for said land to any one other than yourself. State what the contract or agreement between you and said Dwyer was respecting the conveyance of title to said land, and the person to whom it was to be made.

Int. 5. Where did you reside on April 13th, 1854, and where were you at that time?

Int. 6. State when, if ever, you first acquired any knowledge, information, or actual notice, that a deed or conveyance for the said land had been made by said Dwyer and wife to the said James B. Ewell.

Int. 7. If you ever obtained a deed for the said land state when and from whom you obtained the same; and if you did, on or about the 6th of September, 1856, receive a deed for said land from said James B. Ewell, state the reason and consideration for the making of said deed, and state explicitly any knowledge, information, or actual notice you may at that time have had of the said note and mortgage (or either of them) made by said James B. Ewell & wife to the plaintiff Daggs.

Int. 8. It is charged in the plaintiff's bill that a deed for said land, made on the 6th of September, 1856, by James B. Ewell to you, was made by him and received by you with the intent or for the purpose of delaying, defeating, or defrauding the creditors of the said James B. Ewell,
131 and particularly the said plaintiff Daggs. You will therefore state fully what was the intent and purpose of the said deed, so far as you were concerned, and also, to the best of your information and belief, so far as the said James B. Ewell was concerned; and if, at that time, you knew or had any cause to know that said James B. Ewell and wife, or either of them, were indebted to the plaintiff Daggs, or to others, make a full statement of your knowledge or information respecting such indebtedness.

Int. 9. State what authority, consent, or right of any kind was ever given by you to the said James B. Ewell and wife, or to either of them, to mortgage or encumber, or in any manner to dispose of the said land, or any part thereof.

Int. 10. Where were you at the date of said note and mortgage (May 28, 1856), alleged to have been made by said James B. Ewell and wife? Where did you then reside, and where had you resided prior thereto and subsequent to your purchase of said land from said Dwyer and wife?

Int. 11. You will please state any and all facts within your knowledge and recollection relative to your purchase of the said land, your payment for it, the conveyance of it by J. B. Ewell to you, or any and all other matters and things mentioned or referred to in the preceding interrogatories; and if you have any papers or letters relating to any of such matters of enquiry, you will please identify them by signing your name on the back, and deliver them to the officer taking this deposition, to be returned
132 by him therewith, and in your answer to this interrogatory specify briefly what papers or letters you do so deliver.

W. E. GOODRICH,
JACKSON & JACKSON, *Sol's, &c.*

Cross-interrogatories propounded to George W. Ewell, by the complainant in the case, in U. S. circuit court for the western district of Texas, in chancery, of—

THOMAS J. DAGGS, COMPLAINANT,
vs.
JAMES B. EWELL, MARY W. EWELL, & GEORGE W. Ewell. } No. 94.

Cross-int. 1. Did you ever have any dealings in pecuniary matters with

James B. Ewell prior to the 13 April, 1854? If yea, state what they were. Did you keep an account between you and him of your pecuniary transactions and other dealings in respect to money or property? If yea, state the account fully up to that time between you. State also what property or other transactions passed between you & James B. Ewell up to that date, and state them all fully.

X-int. 2. If you say that you made the trade for the land mentioned in the interrogatories of defendant with Dwyer & wife, state when and where it was the transaction occurred, who was present, was it in writing, and, if so, produce the same; if not in writing, being concerning land, state why it was not. Where are Dwyer and wife now? Do you not know that they are dead, and can give no account of said transaction? Where
133 was James B. Ewell at that time? Did you ever see the land before the trade was made; was it bought on speculation, and how much did you give for it?

X-int. 3. If, in answer to direct interrogatories, you say that the money which bought the land from Dwyer was yours, that James B. Ewell was your agent, and that you did not authorize him to take the deed in his name, please state why it was done in this way. Did James B. Ewell ever write to you about the purchase of the land between 1854 and 1856, when you recorded a deed from him? If yea, produce his letters in relation thereto, and say if the letters you produce in answer to this X-int'y are all the letters of James B. Ewell referred to.

X-int. 4. If you say you were not informed that the land had been purchased & deed taken from Dwyer and wife by James B. Ewell till a short time before the deed to you of Sept., 1856, state why you were silent and why did you neglect this matter so long.

X-int'y 5. Give all the letters of James B. Ewell to you relating to the purchase of the said land which were written before the deed to you in September, 1856, and say whether those furnished are all you had from him; and, if not, what have you done with the balance of said letters?

X-int. 6. If you say you furnished James B. Ewell with the money to buy said land for you, when and where did you give it to him; how much of it was there; in what shape did you furnish it, whether in bank
134 bills, gold, or silver, or drafts? If it was in bank bills, gold, or silver, how was it conveyed to said James B. , and by whose hands and under what circumstances? If it was by check or draft, state on what bank or person, by whom drawn, and the date of said check or draft, and in whose favor? Describe it, or identify it, so that the truth of your statement may be shown.

X-int'y 7. Did you have any memorandum from said James B. Ewell, or any acknowledgment in writing that he had received the amount of money from you for the purpose of buying the land spoken of for you? Did you give him any letter of instructions to that effect? If you did either, produce the memorandum, writing, or letter of instructions, and if you do not do so, please state why you do not do it.

X-nt'y 8. Where did you live in 1854, and from that time on to the present, stating each place and the time you lived at each. Where did James B. Ewell live in 1854, and since that time, and state each place and the length of time at each place.

X-int. 9. Did you take the note of James B. Ewell for the money afore-

said? Did you take no note or memorandum from him concerning it? If you did, produce them respectively, and if you do not do so, state why not. Was the money you gave him intended for no other purpose than to buy this particular land? Was not the money given him subject to his
135 own appropriation, as to what land he would buy? How do you know it was your money that bought this land? State all matters enquired of in either direct or cross-int'y on your own knowledge.

WALTON, GREEN & HILL,
Sol. for Complainants.

We acknowledge service of the within notice interrogatories, and waive time.

Austin, Sept. 27, '77.

WALTON, GREEN & HILL,
Sol. for Compl'ts.

In chancery in U. S. circuit court for 5th circuit & west. dist. of Texas.

THOS. J. DAGGS
vs.
J. B. EWELL, MARY W. EWELL, GEO. W. Ewell, Jno. F. Smith, and others.

George W. Ewell answers to direct interrogatories in the above entitled cause

Interrogatorry 1st. To this first inter'og, I answer I am the same George W. Ewell, who is one of the defendants in the above entitled cause, and am fully apprized of the nature and object of the within suit.

Interrogatory 2d. To this second interrogatory, I state I had not the most distant idea of a certain promisory note of 3,456 doll's secured by mortgage executed May 27, 1856, by James B. Ewell and his wife, Mary W. Ewell, to Thos. J. Daggs, until Nov. 1873, when I learned that the
136 sheriff of Gaudalupe Co. had levied on my Vicente Durand tract, and advertized the same for sale for J. B. Ewell's indebtedness.

Interrogatory 3d. To interrogatory third I answer; I formed the acquaintance of Mr. Edward Dwyer and wife some time in Aug., 1853, when on a visit to his house, 9 miles W. of San Antonio, my business there being to purchase his (then) Vicente Durand tract, lying on the E. side of Cibola River in Guadalupe Co., embracing ⅔ (as represented) of a league. I was in company with a Mr. Tarver, of Mobile, Alab., who desired to purchase a portion of same tract, he proposing to take 1,000 acres on the N. boundary line, and I purchasing the remainder at 3 dolls. per acre, gold; terms, one-third down, bal. in one and two years, provided he (Dwyer) would permit me to return home before the cash payment was made, to which he assented, proposing further to accompany us back to the city the next morning and he would furnish me with a letter of instructions to his merchants, Mess. Letchford & Co. in New Orleans, authorizing them to receive of me am't expressed by him, but which I do not now recollect, doll's, as a payment upon a certain tract of land he had sold me, known as his Vicente Durand tract, in Guadalupe Co., on Cibola River. The land was purchased by me in person and for my own use. I remitted every dollar for it myself and with my own money, by draft or exchange on N.

O., but through J. B. Ewell, as ag't, he having no interest whatever in it.

137 Interrog. 4th. To the fourth interrog. I answer: When I left San Antonio the understanding between Dwyer and myself was that when I returned home I could deposit the am't of cash payment with Mess. Letchford & Co., N. O., and send their receipt or acknowledgment of such deposit back to him (suggesting the name of J. B. Ewell through whom to send it to him), and upon presentation of which he would make me a deed. I gave no authority whatever to Mr. Dwyer to execute a deed to any other person than myself, nor was J. B. Ewell ever authorized by me to receive any such deed to himself.

Interrog. 5th. To this fifth inter'og. I reply: I moved from Miss. in Nov., arriving in Marshall the latter part of Dec., 1853, on my way to the Cibola River. Hearing of Indian raids on the San Marcos I at once determined to remain in E. Texas, until I could safely proceed with my family. Consequently I was living, April 18th, 1854, near Marshall, E. Texas; was there myself at that time.

Interrog. 6. In answer to sixth inter'og., I state that not until late in 1856 (Sept.) while on a visit to Jas. B. Ewell's, mainly to get in my papers, (having finished paying for my land) did I learn the facts as they existed. I cannot recollect that it was ever alluded to before.

138 Interrog. 7th. To this seventh interrog. I state: I received my deed from J. B. Ewell in Sept., 1856, accompanied with Dwyer's deed to him, and other deeds, Mexican, and for no other cause but to render a just account of his stewardship as my agent, and for no consideration whatever, conveying to me, as the legal and rightful owner, a title to s'd land; nothing else. I had no knowledge whatever of the existence of any such note and mortgage, or either of them, made by J. B. Ewell and wife to plaintiff, Daggs, nor did I ever receive the least intimation of such a thing until my land was levied on to satisfy such mortg. in Nov., 1873, at which time of sale, Major Brahan, who had been protecting my timber for years, appeared and notified the sheriff that the land he was selling was not the property of J. B. Ewell, but of Geo. W. Ewell, and cautioned him against proceeding. Accordingly the sale was postponed until the next mo., Dec., he sending me notice. My arriving in time was sufficient to stop the second sale, it seemed, as none occurred.

Int. 8. To this eighth inter'og. I answer as before: That J. B. Ewell's deed to me on 6th Sept., 1856, was given by him and received by me in good faith and not meriting the least reflection. That it was not done for delaying, defeating, or defrauding creditors—the sole purpose of the deed being simply to convey the title to me of land I had honestly bought and paid for, and he, J. B. Ewell, acting solely and alone as my agent

139 in my absence, and, I repeat, I had not the most distant idea that J. B. Ewell & wife, or either of them, were indebted to Daggs at all.

Interrog. 9th. To this ninth interrog. I declare emphatically that I never gave myself, or authorized any one else to give authority, consent, or right to J. B. Ewell and wife, or either of them, to mortgage or encumber or in any manner to dispose of the s'd land or any part thereof.

Inter'og. 10th. To this tenth interrog. I answer that, at the date of s'd note and mortgage, May 27th, 1856, alleged as made by J. B. Ewell and wife, I lived near Marshall, E. Tex., where I have lived since Dec., 1853, except 5 y'rs spent in Dallas.

Inter'og. 11th. In answer to the eleventh interrog. I state that in 1853, being in very bad health, I left Miss. in latter part of July, resolved to test the influence of the climate about San Antonio as a dernier resort for the restoration of my health, and after a few weeks' stay there, finding the climate very beneficial to my health, I determined at once to move to that country, under a conviction that my health would be entirely restored. Consequently I commenced looking and enquiring around for a good body of land suitable for opening a farm upon. My attention was particularly called to two grants. This Vicente Durand tract and the Glesses'
140 league adjoining, and after a careful and thorough examination of the two tracts, I determined to buy this Vicente Durand surv., if Dwyer would sell. In the meantime, meeting with a Mr. Tarver, from Mobile, Alab., who was also looking for a home, who being equally pleased with this tract, proposed to join me in the purchase, he wanting one thousand acres, which was consented to by me. Accordingly we arranged to go to San Antonio to see Dwyer, and neither of us being acquainted either with him or the trails leading to the city, we requested J. B. Ewell to accompany us, he being familiar with the county. When we reached San Antonio we found Mr. Dwyer there, who, when I made known my business to him, invited us to go out home with him and spend the night; accordingly we went out; he and I talked the matter over, and agreed upon price and terms, Mr. Tarver taking 1,000 acres and I the balance. I instructed him to make Mr. Tarver a deed to 1,000 acres on the N. boundary line. In the summer of 1856 I traded J. B. Wilson 555 acres adjoining the Tarver tract for property here that I could and did afterwards sell. I should have remarked in connection with the purchase of said land that the privilege was granted me by Dwyer to make my cash payment upon my return home, which will be seen by reference to Letchford & Co.'s letter, and also Vance & Bros., both hereto attached
141 and made part of this answer, corroborating in part what has been already said on payment for said land. The reason alleged by Dwyer for suggesting and adopting the plan of furnishing a letter of instructions to Letchford & Co. in the place of a title bond in regular form was on % of my ill health, fearing I might die before I got home —it answering the purpose, clearly containing an obligation on his part to deed me the land upon receipt of Letchford & Co.'s acknowledgment of deposit by me. I was satisfied to take it, expressing, as it did, so clearly the terms of the purchase by me. I will state further, that immediately upon my return from Seguin in Dec., 1873, I wrote my merchants, the Messrs. Cromwell, N. O., to call on Messrs. Letchford & Co. and procure letter of instructions. They wrote me that they had called as instructed, but the paper could not be found, owing, as they said, to the great lapse of time. Not being content with this, I went down and applied to them myself, but with no better success. They remembered the transaction, but could not find the paper alluded to. As before remarked, I refer to s'd letters hereto attached and made part of my answers—Messrs. Vance & Bro., bearing date Jan'y 22, '54, and 2d Messrs. W. H. Letchford & Co., bearing date 6th March, 1854, both in answer to mine of previous date.

GEO. W. EWELL.

142 [C. H. McGill, notary public, Harrison Co., Texas.]

SAN ANTONIO, TEXAS, *Jan'y* 22, '54.

GEO. W. EWELL, Esq.
Marshall, Tex.:

D'R SIR: Yours of date 27th Dec. is at hand by this day's mail. We called on Mr. Edw'd Dwyer on receipt of your exchange on New Orleans, for $3,000, and requested his acceptance of it on account of the purchase of land from him. He said it was all right, and he would take the exchange and forward it by first mail for collection, and when paid, would be to your credit as a payment on the land sold to you. As he was then a little unwell, he deferred receiving it or giving receipt, but promised to do so before the next mail left for New Orleans. He, however, continued to grow worse after getting home and has since been incapable of doing anything. We are informed to-day that there is strong hopes of his getting better, but no doubt it will be some weeks yet before he will be able to do any business. So soon as he is about we will give the matter our particular attention.

We are very truly, yours, &c.,

VANCE & BRO.

(On the reverse endorsed:) GEO. W. EWELL.

143 [C. H. McGill, notary public, Harrison County, Texas.]

NEW ORLEANS, 6*th Mar.* 1854.

GEO. W. EWELL,
Marshall, Texas.

Yours of the 21st ult. was this day received, enclosing a draft on Webb, Rawlings & Co. for three thousand dollars. The amount has been collected and entered to the credit of Vance & Bro., of San Antonio, Texas, and they have been by us duly advised thereof.

Yours very respectfully,

W. H. LETCHFORD & CO,
Per J. A. OTTO.

(Endorsed on reverse:) GEO. W. EWELL.

Answers to cross-interrogatories propounded to Geo. W. Ewell by the complain ant in the case in U. S. circuit court for the western district of Texas, in chancery, of Thomas J. Daggs, complainant, vs. James B. Ewell, Mary W. Ewell, & Geo. W. Ewell.

Geo. W. Ewell's answer to X-interrogatories above:

X-inter'og. 1. To this first X-interrogatory I answer. The first transaction with J. B. Ewell, recollected now was the purchase by me of J. B. Ewell & R. H. D. Ewell, jointly, a negro boy in 1849, in April thereof, for whom I paid 600 dollars in cash. The next transaction
144 occurred in 1850 or '51. I let J. B. Ewell have 700 dolls. to enable him to move to Texas for the benefit of a consumptive wife, he being in very straightened circumstances, having failed in business. I do not recollect whether I took his note for the am't or not. Be that as it may, some time in 1863, the fall, I think, when I was at his house in

Martininz, Bexar Co., he reminded me of the loan I had made him and offered to repay me in goods, he having but a short time before made a trip to Mexico. As goods were scarce in those war times, I accepted his proposition and took the goods. These are the only two transactions recollected and both settled in the manner described.

X-inter'og. 2. To this second cross-interrogatory I answer most positively that I did purchase the land mentioned in the inter'og. myself of Mr. Edward Dwyer & wife, and in their own house, 9 miles W. of San Antonio. Mr. Tarver and J. B. Ewell were present. It was not in writing, but a verbal contract, until the next morning, when we all went back to San Antonio, and there, in Gilbran's office I think it was, he furnished me a letter of instructions to his merchants in N. O., the Mess. Letchford & Co., authorizing them to receive of me dollars—amount not recollected (exact am't of 1st payment not recollected)—as a
145 payment upon a certain tract of land he had sold me, known as his Vicente Durand tract, and to give me a right for same, which when done should confirm the contract. I cannot produce the letter of instructions to Messrs. Letchford & Co., because they cannot find it, having been mislaid or destroyed. Refer to Letchford & Co.'s letter annexed as a part of this answer, showing that the money was paid by me and for the purpose expressed. I have learned that Dwyer & wife are both dead, also Tarver. If the enquiry, "Where was Jas. B. Ewell at that time?" applies to the time I bought the land, I answer he was present. I saw the land several times and examined it thoroughly before I purchased. I did not buy it on speculation, but bought it to live on myself. I cannot recollect exactly how much I was to pay for it, it has been so long, but to the best of my recollection it was 5,000 dolls. or upwards. This is as near as I can give, having no deed here (my deeds and papers being in Seguin) or other papers to refresh my memory.

X-inter'og. 3. To X-inter'og. third I answer: The explanation J. B. Ewell gave me, when I propounded the question to him, "Why he (Dwyer) had executed the deed to him," was that it was done to save time and prevent any obstacle being thrown in the way of my immediate removal to Texas.

146 The suggestion for the adoption of the plan pursued was from Dwyer to J. B. Ewell; fearing that in my ill health any delay caused in getting a power att'y, which he, J. B. Ewell, suggested, might discourage me, and probably prevent my moving out, in which event he would miss the sale of his land. This was J. B. Ewell's explanation to me in Sept., 1856. I received occasional letters from J. B. Ewell between 1854 and 1856 of a business character, but simply acknowledging receipt of money either in payment for said land or for taxes; nothing more. The letters I cannot produce because misplaced, not intentionally, but by accident, as many of my papers were scattered in moving to Dall. 7 y'rs ago. I never rec'v'd a letter from him between those dates containing any matters of business at all except the kind alluded to.

X-inter'og. 4th. To this fourth X-inter'og. I answer: Having implicit confidence in my brother, J. B. Ewell, and knowing nothing whatever of any mortgage upon my land, I felt that I had nothing to disturb me. Had I re'v'd the least intimation of such mortgage, or any incumbrance whatever being upon my land, I could not and would not have rested one mo-

ment until the same was removed, and the more particularly that I
147 had purchased s'd land as a permanent home, and was expecting each year to move to it.

X-interrog. 5th. To this 5th inter'og. I answer: I have not, and never have had, a business letter, or a letter pertaining to any kind of business, from J. B. Ewell prior to 1856, other than those acknowledging rec'pt of money, either in payment of s'd land indebtedness or in payment of taxes thereon. J. B. Ewell had no interest whatever in this land, and I have never heard of his claiming any. His letters, as I before answered, have been unintentionally misplaced, which I sincerely regret.

X-inte'rog. 6. To this sixth X-inter'og. I affirm most positively that I bought the s'd land of Dwyer and wife myself, and for my own use, for a permanent home, and simply made my remittances in payment of it through J. B. Ewell as agent. I sent it by draft or exchange on New Orleans. There was none of it there only as I sent it. I refer to Vance & Bro. letter, also W. H. Letchford & Co., both annexed, and made part of my answer.

X-inter'og. 7th. To this seventh X-inter'og. I answer: J. B. Ewell never bought a foot of land for me in his life, nor did I ever authorize him so to do. I answer again, I bought the land from Dwyer & wife myself in person. The only instructions I ever gave J. B. Ewell were to
148 pay over to Dwyer money as I remitted to him and keep the taxes paid on s'd land. J. B. Ewell never acted in any other capacity in this transaction only as my agent.

X-inter'og. 8th. To this eighth X-inter'og. I answer: In 1854, I lived near Marshall, Texas, and have lived there ever since, except 5 years spent in Dallas, Tex.; 7 years ago I moved to Dall., as my health required a change; I lived there 5 years, and then returned to or near Marshall, to my old home. In 1854 J. B. Ewell lived in Bexar County, and remained there until the close of the late war. Since then he has spent the most of his time in the North, until 5 or 6 years since he returned to the South, and for some 4 years past has made Waco his home.

X-inter'og. 9th. To this ninth X-interrog. I answer: I took no note of J. B. Ewell, or memorandum either, concerning this land. I gave him no money to buy my land, but the money I sent him was to pay for the land I had myself bought of Dwyer, i. e. my Vicente Durand tract. Not one dollar did I furnish J. B. Ewell for his own appropriation as to what land he would buy, but all the money sent him by me was to be applied in payment for this particular land which I had bo't of Dwyer and no other. J. B. Ewell always acknowledged promptly the rec'pt of moneys remitted by me with the remark that it was applied as instructed;
149 refer again to letters attached as part of my answer.

GEO. W. EWELL.

THE STATE OF TEXAS,
Harrison County:

On this the 7th day of December, A. D. 1877, before me, C. H. McGill, a notary public in and for said county and State, duly qualified according to law, personally appeared Geo. W. Ewell, to me well known, who made the foregoing answers to interrogatories hereto attached issued out of the United States circuit court for 5th circuit & western district of Texas, at

Austin, in the case of Thomas J. Daggs vs. J. B. Ewell, Mary W. Ewell, George W. Ewell, John F. Smith, and others, and numbered on the chancery docket 94, and that the said answers were signed and sworn to before me by the said witness.

Witness my hand and official seal the day and date above written.

[SEAL.] C. H. McGILL,
Notary Pub., H. Co., Texas.

150 Depositions of J. B. Ewell, to wit:

Title of cause. Thomas J. Daggs, plaintiff, vs. James B. Ewell & wife, Mary W. Ewell, Geo. W. Ewell, John F. Smith, et al., defendants. In chancery. Suit pending in U. S. circuit court for the western district of Texas, at Austin. Depositions of James B. Ewell. Rec'd from post-office at Austin, & filed Dec. 22, '77. M. Hopkins, cl'k. In answer to interrogatories & cross-interrogatories propounded to him by plaintiff and defendant. Opened by consent Ap'l 14, 1879.

M. HOPKINS, *Cl'k.*

WACO, TEXAS, *Dec.* 19, 1877.

Received this package, sealed from the hands of D. A. Kelley, a notary public, the officer before whom the inclosed depositions were taken, to be forwarded as directed by due to M. Hopkins, clerk of cir-
151 cuit court of United States for western district of Texas, at Austin, in Austin, Travis County, Texas, this the 19th day of December, A. D. 1877.

W. R. CARR,
Postmaster at Waco, Texas.

Also endorsed: D. A. Kelley, notary public for McLennan County, State of Texas.

And in words following, to wit:

OCT. 12, 1877.

In chancery. In the circuit court of the U. States for the western district of Texas.

THOMAS J. DAGGS
vs.
J. B. EWELL & WIFE, GEORGE W. EWELL, & JOHN F. SMITH, et al.

In this cause it is agreed by and between the parties, by their solicitors, that the witnesses needed by either party may be taken by notice
152 of interrogatories to the opposite party and cross-interrogatories to same, and may be taken and returned into court in accordance with the practice of the district court of the State of Texas; the depositions to be taken before and returned by the officers, or any of them, mentioned in section 863 of the Revised Statutes of the United States, copy of this

agreement being sent with the said interrogatories as authority for the officer, commissions to take the same being waived. But depositions may be taken in any other manner allowed by the laws of the United States applicable to courts of equity.

It is further agreed that the evidence thus taken and returned shall remain of file in the circuit court of the United States aforesaid, and shall be read in evidence subject to objections for irregularities in the
153 mode of taking and return and objections for immateriality and incompetency of the evidence.

WALTON, GREEN & HILL,
Sol's for Compl't.
JACKSON & JACKSON,
Sol's for G. W. Ewell.
SHEEKS AND SNEED,
For J. F. Smith et al.

I, Matthew Hopkins, clerk of the circuit court of the United States in and for the western district of Texas, at Austin, do hereby certify that the foregoing page and fractional page contain a full and true copy of the agreement of *the agreement of* parties through their solicitors, filed in case No. 94, chanc'y, entitled Thomas J. Daggs vs. J. B. Ewell & wife, George W. Ewell & John F. Smith et als., as the same appears of record on pages 142 & 143, book B, chanc'y rules.

154 In testimony whereof I have hereunto set my hand and impress of the seal of our said circuit court, at Austin, this the 20th day of November, A. D. 1877.

[L. S.] M. HOPKINS, *Clerk.*

In chancery in U. S. circuit court for 5th circuit & western district of Texas.

THOMAS J. DAGGS
vs.
JAMES B. EWELL, MARY W. EWELL, GEORGE W. Ewell, John F. Smith, & others. } No. 94.

Interrogatories to be propounded to James B. Ewell, a resident of McLennan County, in said district, and a witness for the defendants George W. Ewell, John F. Smith, Laura Smith, and Ida, Sallie,
155 and Minnie Wilson.

The plaintiff and his solicitors, Walton, Green and Hill, will take notice that the answers of said witness to the following interrogatories will be read in evidence for said defendants on the trial of said cause, and can propound cross-interrogatories, &c.:

Interrogatory 1. State whether or not you are the same James B. Ewell who is one of the defendants in the above-entitled suit, brought by the plaintiff, Daggs, to foreclose a mortgage on some 1,653 acres of land in Guadalupe County, Texas, known as the Vincente Duran tract, and which mortgage purports to have been executed May 27th, 1856, by James B. Ewell and his wife, Mary W. Ewell, to secure to plaintiff, Daggs, the payment of their note to him of the same date for $3,456.00, due and
156 payable three years after the said date.

Int. 2. If you are the same James B. Ewell as aforesaid, state fully what was the consideration of said note and mortgage. If the consideration was loan of money, state how much money, and if any interest on such loan is or was included in the said note, state how much interest is so included, and the rate of interest at which the same was computed.

Int. 3. What knowledge or notice of any kind of the said note and mortgage, or of either of them, did the defendant George B. Ewell have at the time they were made or at the time you (or you and your wife) received from the plaintiff, Daggs, whatever consideration he parted with for said note and mortgage?

Int. 4. If at the date of said note and mortgage you and your
157 wife, or either of you, had any authority from said George W. Ewell, of any kind whatsoever, to mortgage, or pledge, or in any manner to dispose of the said land to the plaintiff, Daggs, or to any other person, you will please state all about any such authority. If you had no such authority, you will please so state.

Int. 5. If the defendant George W. Ewell ever received any benefit or advantage from the said note and mortgage, or either of them, or from the consideration paid for them by the plaintiff Daggs, you will please state such benefit or advantage, and all about it.

Int. 6. It is alleged in the plaintiff's bill that on the 13th of April, 1854, a deed to you for the said 1,653 acres of land was executed by Edward Dwyer and his wife, Mariana Dwyer. You will please state whether you did or did not, at that date, or at any time before or after that
158 date, purchase from said Dwyer and wife, or either of them, or contract to purchase the said land, or any part thereof, or if you ever paid or contracted to pay for the said land or any part thereof. If yea, state all about such contract or purchase. If nay, then state how or why the said deed was executed to you by the said Dwyer and wife.

Int. 7. If you have any knowledge respecting a purchase of said land by the defendant George W. Ewell from the said Dwyer and wife, or either of them, you will please state all you know about the same, giving dates as near as you can recollect, and state all you may know about the said Dwyer and wife, or either of them, having received payment for said land, and by whom such payment was made, and whose money
159 such payment was made with.

Int. 8. If in your answer to interrogatory 7, you state that the said land was purchased by said George W. Ewell from said Dwyer and wife, and that said George W. paid them for it with his own money, then state whether said George W. Ewell ever did or did not in any manner authorize said Dwyer and wife to convey said land to you, or authorize you to take any conveyance thereof to yourself; if yea, state all about such authority.

Int. 9. State what interest, if any, you owned, or had, or claimed, in any money or other consideration paid to said Dwyer and wife for the said land.

Int. 10. If the said land was purchased and paid for by the said George W. Ewell, state where he resided at the time (April, 1854) when the said deed was made to you by the said Dwyer and wife. And
160 state whether or not said George W. Ewell was present at the time and place said deed was made at; and further, state when, or about when, he first learned that said deed was made to you instead of to him.

Int. 11. It is alleged in the bill of the plaintiff, Daggs, that on the 6th day of September, 1856, you made to said George W. Ewell a deed for the said land; if at that date, or prior thereto, the said George W. Ewell had any knowledge, information, or actual notice that you, or you and your wife, had made the plaintiff, Daggs, a mortgage upon said land, or had in any manner dealt with said Daggs in relation to said land, you will please state all you may know respecting such knowledge, information, or actual notice had by the said George W. Ewell.

161 Int. 12. It is charged in the bill of the complainant, Daggs, that your said deed for said land was made to the said George W. Ewell, or was procured by the said George W. Ewell for the purpose, or with the intent to hinder, delay, or defraud your creditors, and particularly him, the said Daggs. You will please state fully the purpose and intent, and for what reason and consideration the said deed was made by you to the said George W. Ewell; and, further, state what knowledge, information, or actual notice, if any, the said George W. Ewell had on or prior to said 6th of September, 1856, of any indebtedness by you to the plaintiff, Daggs, or of any dealings between you and the said Daggs.

Int. 13. If it be true that on the 27 day of May, 1856, you and your wife executed a mortgage on said land to secure to the plaintiff,
162 Daggs, the payment of your note for $3,456.00, state whether, in the execution and delivery of the said mortgage, you (or your wife) dealt with the said Daggs in person or with agents appointed by him for the purpose. If you dealt with agents of the said Daggs, state whether he (Daggs) was present or absent at the making or delivery of said mortgage. State who the said agents were, and if they, or either of them, had, when they received said mortgage from you, any knowledge, information, or actual notice of the real ownership of the said land. You will please state all you know respecting the possession of such knowledge, information, or actual notice by them, or either of them; and state anything that was said or transpired between you and them, or either of them, when
163 they received said mortgage, touching or respecting the real ownership of the said land, and who was the person to whom they were so notified the land belonged, and respecting the reason or purpose for which you made and they accepted said mortgage.

Int. 14. On the back of your said note to plaintiff, Dagg, the following credits are endorsed, viz: Feb'y 28th, 1859, $800.00; April 31st, 1859, $206.65; November 3rd, 1859, $300.00; April 10th, 1861, $39.00; Jan'y 23rd, 1866, $400.00. State by whom and to whom these payments were made, and, in short, what kind of funds; and if any other payments were made on said note, state by whom made, when made, and in what sort of funds.

W. E. GOODRICH & JACKSON & JACKSON,
Sol's, &c.

164 In ch'y. In U. S. circuit court for West. dist. Texas, at Austin.

THOMAS J. DAGGS
vs.
JAMES B. EWELL, MARY W. EWELL, GEORGE W. Ewell, & John F. Smith, et al. } No. 94.

(Objections to the competency of James B. Ewell as a witness for de-

fendant in this cause, because he is a party to this suit, and because the complainant's bill has heretofore been taken for confessed against him for want of answer thereto, and the said judgment pro confesso remains in full force.)

The said complainant propounds to the said James B. Ewell the following cross-interrogatories:

Cross-interrogatory one. Are you not a party to this suit, and are you not the same person against whom a judgment was rendered in the
165 United States circuit court for the western district of Texas, Austin, upon the note mentioned in direct interrogatory No. 1, on the 14th July, 1873, for the sum of thousand five hundred and thirty $\frac{95}{100}$ dollars?

Cross-interrogatory two. If you say, in answer to 3, 5, & 5th direct interrogatories that George W. Ewell furnished the money to buy the land spoken of, and you had no interest in it; that the mortgage of the land by you and your wife to complainant was without his knowledge or consent, and that you nor your wife had any authority to so deal with the land from George W. Ewell, then say why you acted in such bad faith to your brother, the said George W. Ewell; why did you ever take the deed from Dwyer in your name, and why did you not inform George W. Ewell you had done so, with your re'sons therefore? Please explain your
166 contract in this respect in regard to the question of fair dealing and honesty.

Cross-interrogatory three. If, in answer to direct interrogatory 6, you say you did not contract for the purchase of the land spoken of from Dwyer & wife, who did make the contract, where were you when the contract was made, and where was it made? If you say your brother George W. Ewell made the contract, state if its was by letter or personal conference; did he, or whoever made the contract, pay anything at the time; did he, or whoever is alluded to, take any note or memorandum of the contract at the time, signed by Dwyer & wife, or either; if not, why not? Who was present when the contract was made; in what house? Are not Dwyer and wife now dead?

Cross-int'y four. Did you not pay the money for the land to
167 Dwyer & wife; if not, who did? How much of it was there, & in what sort of money or article was it paid? If you say you paid it for your brother out of your brother's means, state how he sent it or conveyed it to you. When did you get it? Was it in gold, silver, bank notes, or drafts or checks? If in bank notes or checks, state the date of same, by whom drawn and endorsed, and in whose favor? Where did the drawer & drawee live at that time? Give in full, history of this matter.

Cross-interrogatory five. Where did your brother, George W. Ewell, live at that time? If you say he did not live in Texas, but sent you the money or consideration that bought the land, please give with your answer to this cross-interrogatory the letter of instructions you had from him directing you what you should do with the money.

168 Cross-interrogatory six. What letters of instruction in reference to the purchase of this land did you receive from George W. Ewell? Give them as an exhibit to your answer to this interrogatory.

Cross-int'y seven. Did you ever communicate to George W. Ewell by letter as to what you had done with his money or monies; did you not in-

form him you had bought the land for him, and did you conceal the fact that you had taken the deed in your name? If you did not inform him of the purchase of the land, and how you had spent the money, why was it that he was silent so long in reference to the subject?

Cross-interrogatory eight. If George W. Ewell wrote to you to enquire what you had done with the money or wrote to you in any way about this land before the 27th May, 1856, claiming it, please give his let-
169 ters in answer to this interrogatory.

Cross-interrogatory nine. Was it any interest to Dwyer and wife that they should give the deed to you instead of making it to George W. Ewell; what agency had Dwyer & wife in causing the deed thus to be made; deed you not pay them the money and request the deed to you; did Dwyer & wife, or either of them, know whose money it was? If the' did and knew what you told them, please state what representation you made to them to induce them to place the title in such condition that you could either defraud innocent purchasers from you or the said George W. Ewell. Please state who else now living knows anything about the transactions enquired of between you & Dwyer & wife.

Cross-interrogatory ten. If you say the whole of this transaction
170 was of your making; that George W. Ewell sent you the money to pay for land he had contracted for; that you caused the deed to be made in your name without his knowledge or consent, and that you did not inform him of it for more than two years, please state your reasons for so doing.

Cross-interrogatory eleven. State what advantage there was that could possibly incure to George W. Ewell for you to take the title in your name. What advantage could there be to any one but yourself in enabling you to obtain money by a sale of the land in your name or by making a loan upon it?

Cross-interrogatory twelve. Is not the said George W. Ewell your brother? If he is, state what amount of money or property he
171 was worth at that time, i. e., the time of the land purchase aforesaid; in what and where was his property situated? Name what it was.

Cross-interrogatory thirteen. Were there not, at the time referred to, unsettled accounts between you and George W. Ewell? And in answering this please give an account of the sale of accounts in money and property which existed at that time between you and George W. Ewell.

Cross-interrogatory fourteen. Were you not the agent of said George W. Ewell in everything in your part of Texas? Were you not to be interested in the purchase aforesaid? Were you to get anything for your trouble & expense in consum'ating the purchase?

Cross-interrogatory fifteen. Did you not, in fact, borrow the
172 money spoken of from George W. Ewell?

Cross-interrogatory sixteen. What particular inducement was there for George W. Ewell, who lived in another State, to buy the tract of land in question? Did he buy it as a speculation? If so, how much did he give, & how much is it worth now? Did George W. Ewell ever see the land before the purchase of you, who was with him? How came he to buy it?

Cross-interrogatory seventeen. When you give the deed of mortgage and note mentioned in the bill to Thomas J. Daggs, who was present?

Who acted for Mr. Daggs? Did Mr. J. J. Allen or Allen & Houston act for him; and say whether you informed Mr. Allen that the land had been bough' with the means of George W. Ewell. Please repeat, as
173 near as you can, the conversation. Did you give him the information before the note was signed by you and you had gotten Daggs' money? State all that occurred, charging notice on Daggs of George W. Ewell's right to the land, the time and place, and who were present, and tell, if you can, why Allen or Daggs' agent persisted in letting you have the money after such a fatal disclosure.

Cross-int'y eighteen. Did you not, on the occasion of giving the mortgage and executing the note above mentioned to Daggs, tell Mr. J. J. Allen, or whatever agent Daggs had, that the property mortgaged was your own property, and free from incumbrance?

Cross-interrogatory nineteen. Did you not see Mr. Thomas J. Daggs in Texas some time before the note & mortgage was executed, and
174 did you not then offer to borrow from him money by offering to secure the loan by the mortgage of the property above referred to, and other property? Did you not then refer to the above-mentioned property as your own, and did he not then tell you he would let you have the money as soon as he returned to Virginia? If not, what was said between you about the proposed loan?

Cross-interrogatory twenty. If you said, in answer to direct interrogatories, that the agent of Thomas J. Daggs, at the time of the loan of the money to you, agreed to take the land as temporary security, please state if it was agreed between you and him what other property, rights, or credits belonging to you was to be substituted. Describe the security to
175 be substituted and the amount of such security, & if debts or claims, name upon whom they were. What became of such intended substituted security?

Cross-interrogrtory twenty-one. Please state nothing in answers to interrogatories & cross-interrogatories except that which you know of your own knowledge, and after reading them over say what thing or parts of your deposition is stated on your knowledge, and what part on information, and who informed you, and what part on belief only, and explain why this claim of George W. Ewell to a resulting trust in said land was not sooner brought to light.

WALTON, GREEN & HILL,
Solicitors for Complainant.

We acknowledge service of the within notice & interrogatories, and waive time.

Austin, Sept. 27, 1877.

WALTON, GREEN & HILL,
Sol. for Cmpl't.

176 Suit pending in chancery in the U. S. circuit court for 5th circuit & western district of Texas.

THOMAS J. DAGGS
vs.
JAMES B. EWELL, MARY W. EWELL, GEO. W. Ewell, JOHN F. SMITH, & others. } No. 94.

Answers and depositions of James B. Ewell, after being duly sworn, to the accompanying interrogatories and cross-interrogatories propounded to him

in the above styled and numbered suit, being No. 94, Thomas J. Daggs v. James B. Ewell et al., pending in chancery in the United States circuit court for the 5th circuit and western district of Texas, taken before D. A. Kelley, a notary public, duly commissioned & qualified, within and for the county of McLennan, State of Texas, in accordance
177 with the agreement of the solicitors of the parties in said cause, a certified copy of which is hereto attached.

Ans to int. 1st. I am the same indentical James B. Ewell spoken of in int. 1st.

Ans. to int. 2nd. The consideration for said *rate* and mortgage was the loan to me by plaintiff, Daggs, of the sum of two thousand dollars, with interest thereon compounded for three years at twenty per cent. per annum, which was embraced in said note. The principal of said note was two thousand dollars, and the remainder, $1,456.00, was interest compounded as aforesaid.

Ans. to int. 3d. Defendant Geo. W. Ewell had no knowledge of said note and mortgage at the time they were made, or at the time
178 the *the* $2,000.00 was received from plaintiff, Daggs.

Ans. to int. 4th. Neither I nor my wife had any such authority as is spoken of in this int. No. 4.

Ans. to 5th int'y. George W. Ewell never received any benefit or advantage from said note or mortgage in any manner whatever. The money received from plaintiff, Daggs, was used by me for my purposes and interests solely.

6th. Ans. to int. 6th. I never purchased from said Dwyer & wife, or either of them, nor contracted to purchase said land or any part thereof from them, or either of them, at the date mentioned, or at any other time, either before or since. Neither did I ever pay or contract to pay for said land, or any part thereof, to any person at any time. The deed was
179 executed to me by Dwyer & wife at the instance and request of Dwyer for the following reasons:

Geo. W. Ewell was then living in Mississippi & had been out here in Texas with a view to purchasing land & moving to the same. While here he bargained for the land, (1653 acres) spoken of with Dwyer, provided he could raise one third payment at a stipulated time which I cannot now remember. He returned to Mississippi & sent the money to me, & I made the one-third cash payment for him to Dwyer on the land, and of course, it fell to Dwyer's part to make a deed; at that time Dwyer required a mortgage on the land to secure the balance of the purchase money, a matter which had not been spoken of or mentioned, and as Geo. W. Ewell was then in Mississippi, Dwyer suggested that the deed should be
180 made to me, so that I could execute the mortgage on the land to him to secure the deferred payment, & this was done accordingly. The trouble about the mortgage did not arise until I went to settle the first payment with Dwyer.

Ans. to int. 7th. Geo. W. Ewell was here in Texas during January & February, 1854, for the purpose of buying lands, as stated in the foregoing answer. I went with him to look at and showed him several tracts and among other tracts the Vincente Duran tract, the one in controversy, which he liked better than any other, & I went with him to San Antonio to see

Mr. Dwyer, then owner of the tract. My brother, Geo. W. Ewell, saw Dwyer & made the purchase from him for a part cash to be made on his return to Mississippi & the balance in one & two years. After Geo.
181 W.'s return he forwarded me, about 20th March, 1854, the first payment, which was upwards of one third, & I took the money to Mr. Dwyer & paid it to him for Geo. W. Ewell on his land, as stated in the foregoing answer, & then arose the trouble about the mortgage which had not been thought of before, as previously stated. I made the payment to Dwyer in person. The money belonged to Geo. W. Ewell & I made the payment for him on the land. Dwyer knew that it was his money & that I was making the payment in accordance with his previous*ly* agreement with Geo. W. as above stated.

8th. Ans. to int. 8th. Geo. W. Ewell never did, in any manner whatsoever, authorize said Dwyer and wife to convey said land to me, neither did he authorize me to take any conveyance thereof to myself, but it
182 was done at the special suggestion of Dwyer when the trouble about the mortgage arose, stated in answer to interrogatory 6th & 7th, & Geo. W. Ewell was then in Mississippi and had no knowledge of the matter until afterwards.

Ans. to int. 9th. I neither owned, had, or claimed any interest in any money or other consideration paid to said Dwyer and wife for said land.

Ans. to int'y. 10th. He then resided in Marshal County, Mississippi, April, 1854, and was not present at the time and place said deed was made I do not recollect the time. I notified him that the deed was made to me; suppose it was at the time he made the last payment, at which time I and my wife deeded the land to him, but I have no definite recollection
183 of the time I first notified him of the deed being in my name.

11th. Ans. to int'y. 11th. I never did, at any time, inform said George W. Ewell of the mortgage by myself & wife to Daggs, as the giving of the mortgage on his land was a temporary arrangement, & told Geo. W. Ewell nothing about my dealings with said Daggs, and to the best of my knowledge, information, & belief, said mortgage on the said Geo. W. Ewell's land had been cancelled & annulled before the time of the making of said deed by me to him, on the 6th of Sept., 1856.

Answer to int. 12th. The deed from me to Geo. W. was not made for the purpose or with the intent to hinder, delay, or defraud any creditors, or said Daggs, or any other of them, but it was made to said Geo. W.
184 Ewell (without his procurement) for the reason that he had bought the land & it had been paid for in full with his money, & there never would have been any occasion for my having to pass the title out of me had it not been that it was temporarily vested in me pursuant to the wishes of Dwyer as heretofore stated. Geo. W. Ewell never knew Daggs to my knowledge, at any time, and never had any knowledge of any indebtedness by me to said Daggs, and never knew anything at al' of the dealings between Daggs & myself either before or after the date of said deed, 6th Sept'r, 1856, until a short while before the bringing of the present suit.

Ans. to int. 13th. Myself and wife at the time we executed said mortgage on 27 May, 1856, dealt not with Daggs in person, but with
185 Mess. Houston & Allen, of San Antonio, who said and claimed that they were acting as the agents in the matter for Daggs. Daggs

was not present, but was absent in Virginia at the time of making said mortgage. Houston lived in the county close by the land at the time, and knew that it belonged to Geo. W. Ewell, and the matter was spoken of & talked about at the time of the execution of the mortgage. Prior to this time Daggs spent several months at my house, and while there agreed to loan me money by taking a mortgage on my land, the tract upon which I was then living, known as the John Taylor tract. He agreed to sent it to me soon after he returned to Virginia, where he lived. Shortly after he did return, I was in San Antonio, and as I was passing by Houston & Allen's office, one of them called me in and informed me that the money from Daggs had come. I told them, they both being present,
186 that I was not in a condition at that time to execute the mortgage, as I had only a bond for title to my own land, but suggested to them that the title to the tract in controversy, 1,653 acres, the Vincent Duran, was in my name for the present temporarily and that I could give them a mortgage upon it. I told them that it was really Geo. W. Ewell's and belonged to him, but that the title was temporarily in me for the purpose as stated in interrogatory 6th, and that I could give them a mortgage upon it until I could get a deed to my land, which I would do very soon, and then the mortgage could be transferred to my own tract and be in accordance with my agreement with Daggs. They agreed to this, and the mortgage was executed accordingly. The' charged me a fee for
187 invest*invest*igating the title to the Geo. W. Ewell tract of land, which I paid them.

Ans. to int. 14th. I think all the payments as made on the note were made to Allen & Houston as Daggs' agents, except the one of January 23rd, 1866, of $400.00, which was made to Daggs himself. All the payments were made in gold & silver.

J. B. EWELL.

Answers to cross-interrogatories.

1st. Ans. to 1st. I notice my name in the style of this suit as a defendant, but if I have ever been served with any process herein I have no recollection of it. I am the same person against whom judgment was rendered on 14th July, 1873, for $3,530.95, as spoken of in the latter part of int. 1st cross.

188 Ans. to 2d cross. I took the deed in my own name at the suggestion of Dwyer, so that in the absence of my brother, the title thereby being placed in me, I could give him a mortgage on the land to secure the deferred payments; I acted in the way I did, as to giving a mortgage on Geo. W.'s land, to secure the loan of money from Daggs that I stood in need of, with a perfect understanding with Allen & Houston that it was temporary, & was to be transferred to my own land as soon as I could make the last payment on my own land & get a deed in my own name, which I expected to do in a short while. I never intended to permanently incumber the land, & considered the transaction only tem-
189 porary, & will always believe, and am confident of the fact that said mortgaged was released & transferred to my own land; why it was never recorded I cannot tell.

Ans. to cross 3d. Geo. W. Ewell made the contract; I was with him in

San Antonio when the contract was made, which was by personal conference between him and Dwyer. Nothing was paid at the time; neither was any note given or memorandum made at the time, for the reason that Geo. W. Ewell was to return home, in Mississippi, & see if he could raise the cash payment within the time required by Dwyer. The contract was made in Callahan's store in San Antonio. Callahan, Geo. W. Ewell, Dwyer, & myself were present. I think Mrs. Dwyer is now living; I have
190 never heard of her death; I have not heard of either of the parties for a long time; I never heard of Dwyer's death.

4th ans. to X-4th. I paid the money to Dwyer, to the best of my recollection; the first payment was twenty-five or six hundred dollars; can't remember exactly. It was paid in a draft on New York, sent me by my brother Geo. W. by mail, drawn by one of the banks of Memphis, Tennessee. Can't remember the date, but about eight or ten days prior to the time of the date of the deed from Dwyer to me. To the best of my recollection the draft was made payable to Dwyer, & was not endorsed by any one. Dwyer was then living on his ranch, six miles south of San Antonio. Geo. W. Ewell was then living on his farm in Marshall County, Miss., his post office, Red Bank.

191 Ans. to cross 5th. On his farm in Marshall County, Miss. I have not the letters that contained the drafts, or any others from him, prior to 1866. In 1866 I moved to Baltimore, Maryland, & all my library, together with letters & papers, including my letters from him, were lost in transit.

Ans. to cross 6th. I received no letters of instruction from Geo. W. Ewell or any one else giving instructions about the purchase of the land. Geo. W. had made the purchase while he was in Texas, or bargained for it in the event he could raise the first payment within the time allowed by Dwyer.

Ans. to cross 7th. I acknowledged receipt of his letters and
192 amount enclosed at time of reception of same, & notified him that I had paid the money to Dwyer immediately after such payment. I did not inform him that I bought the land for him, for he had purchased it himself, and knew that fact. I do not recollect at what time I informed him that I had taken the title in my name. I wrote to him on receipt of each remittance that it had been applied to the payment of the purchase money due on his land. The last payment was two years from the time of purchase. The only way in which I can account for his silence, he was totally ignorant of the fact that I had given a mortgage on his land.

Ans to int. 8th cross. He never wrote to me inquiring about what I had done with his money. I always wrote him, on receipt of the money,
193 that I had paid it on the land. I have none of his letters previous to 1866, for the reason before stated.

Ans. to cross-int. 9th. The interest of Dwyer & wife in making the deed to me was to put me in a condition to execute a mortgage upon the land, and thereby secure the two last payments due upon the land. They had no agency to cause the deed thus to me made that I know of so far as Geo. W. Ewell was concerned. Dwyer was agent for himself in having the deed made to me. He suggested that course. I paid Dwyer the money, but did not request or suggest or intimate the making of the deed to me, or even think of such a thing, until it was suggested by Mr. Dwyer.

Dwyer knew that it was Geo. W. Ewell's money that I had paid
194 him, and further, he knew I was paying it for Geo. W. Ewell, for I told him I hadcome to make the first payment on Geo. W.'s land, he having sent me the money for that purpose. I made no representations to Dwyer and wife in order to induce them to make deed to me. The' did it in the're own interest, so that I could give them a mortgage, as before stated. I never intended to defraud Geo. W. Ewell, or any innocent purchaser from me, for I told the parties at the time that I mortgaged it that it belonged to Geo. W., and as for any other subsequent purchaser my recollection is that the mortgage was long since transferred to my own land. If I mistake not, W. B. Leigh, of San Antonio,
195 wrote the deed from Dwyer to me, & was conversant with the transaction. I think he examined the title for Geo. W. Ewell.

Ans. to cross-int. 10. The transaction was not of my making. The deed was made in my name without his knowledge or consent, but I did not cause it to be done, & I did not inform him of its having been done until about the time of the last payment, & and then did it only for the purpose of explaining to him the reason why it became necessary for me to make him a deed at all, & state to him how it was the deed came to be made to me. Prior to this time it did not occur to me that it was necessary for me to inform him of the matter, as he & I both knew that no matter how the papers were drawn, nor to whom the deed was made, the land was bound until the purchase money was paid. I knew, furthermore, that if, when the purchase money was all paid, I made a deed to him his title would be all right, & this I always intended to do, & did so, although I gave a mortgage upon it when I knew I had no authority for so doing. I did so knowing that it was only temporary, and believing that I could have it transferred to my own land soon, and I now believe that it was done.

Ans. to cross-int. 11th. At the time the parties considered that a mortgage must be made in order to secure the purchase money, and as Geo. W. Ewell lived, and was then, in Mississippi, and could not be here to
196 execute the mortgage, and as it required time and delay, and involved some uncertainty to have the matter attended to by mail, and as the parties were then there present, and Dwyer was desirous that the matter should be settled, he suggested that the deed be made to me, and that I then execute to him a mortgage securing the balance of the purchase money.

I did not look upon the matter as being of any advantage to me, for I did not wish to be troubled about it, and only consented for the deed to be made to me at Dwyer's request, as the suggestion by him seemed to be the shortest way of settling the matter in the absence of Geo. W. Ewell. In all that I did I had in mind the interests of Geo. W. Ewell, and never thought once of the opportunity suggested by the solicitors, to wit, sell it, or make a loan upon it, and thereby defraud Geo. W., or some innocent purchaser. I disclaim any such intentions.

Answer to cross-int. 12. He is my brother. At that time he was worth not less than thirty thousand dollars, which consisted chiefly of a farm and negroes in Marshal County, Mississippi.

Answer to cross-int. 13. At the time referred to, since 1852, there has been no unsettled business of any kind, accounts, notes, money, bonds, re-

ceipts, obligations, or anything else of any kind, between said Geo.
197 W. and myself. He owed me nothing; I owed him nothing.

Answer to cross-int. 14th. I was not the agent of the said Geo. W. for anything but the payment of the taxes on the land, and by referring to the tax-lists it will be found that the taxes from 1854 and thenceforward were paid on the land as the property of Geo. W. Ewell. Of course I acted for him, making the payments on the land. He made the purchase himself; I had but little trouble with the matter, was at no expense, and never charged or got anything for what I did. It was a gratuity on my part.

Ans. to cross-int. 15th. I did not, in theory, nor in fact, nor in any other way, borrow the money spoken of from Geo. W. Ewell.

Ans. to cross-int. 16th. George W. Ewell bought the land in question for the purpose of moving to it with his family. He came as far as Marshall, Eastern Texas, on his way, and his wife hearing of the Indian raid, which had just been made through the Cibola country, refused to go further west. He lives there now. Geo. W. Ewell did not buy the tract of land as a speculation, but for the purpose and with the expressed intention of living upon it. He gave three dollars per acre for it, and I sup-
198 pose could sell it for four or four and one-half dollars per acre. He saw the land before he purchased it. I showed it to him, and he rode over the tract a dozen times before he purchased it.

Ans. to cross-int. 17th. Allen & Houston was present, and acted for Mr. Daggs. I told Mr. Allen the land belonged to Geo. W. Ewell, and that the title was in me for the purpose of giving a mortgage to secure the purchase money notes, as I then had no deed to my own land. I offered to give him a mortgage upon Geo. W. Ewell's tract to secure Daggs, and that I wished it to be only temporary until I got the deed to my land, which would be about one or two months, and that as soon as I got my deed, I wished the mortgage released and placed on my own land according to agreement with Daggs. Mr. Allen assented to this, and two or three days afterwards I carried my wife to San Antonio, and we executed the mortgage. The manner in which the conversation occurred was as stated in direct interrogatory No. 13th. As I was passing by Houston & Allen's office, one of them called me in and told me that the money from Daggs had come; I replied, it was too soon for me, as I had not got a deed to my land. Allen said he wanted the money to be at interest, and not lying there in his safe. I then mentioned as a temporary arrangement the giving of a mortgage on Vicente Duran tract. Houston re-
199 marked, I thought that was your brother's land; I answered that it was, but that the title was in me, and then the conversation occurred as before stated. This was all before the mortgage was executed. Mess. Allen & Houston were satisfied that it would be only a short while until I could be in a condition to give them a mortgage upon my land, believing that I would soon have the mortgage transferred from Geo. W.'s tract to my own. They consented or agreed to take the mortgage upon said Geo. W.'s tract, and, to the best of my recollection, the mortgage was afterwards transferred in accordance with that understanding.

Ans. to cross-int. 18th. I did not tell Mr. Allen anything of the kind. Allen & Houston charged me twenty dollars for writing the mortgage & looking into the title.

Ans. to cross-int. 19th. Mr. Daggs spent three months at my house previous to the transaction, and told me he had money to loan in Virginia, and would like for me to take it. I agreed to take it provided I could secure him, and he said a mortgage on my farm was all he wanted, to which I agreed; and he said he would send the money out so soon as he returned to Virginia. I did not offer the land in controversy, or any other property as security, excepting my farm. Daggs had been over Geo.
200 W. Ewell's land often with me, riding around and hunting, and knew the land to belong to my brother, Geo. W. Daggs proposed to lend me the money at twenty per cent. (20%) per annum, and secure himself by mortgage on my farm, upon which I was then living, and was fool enough to accept it.

Ans. to cross-int 20th. The tract of land and farm upon which I was then living was agreed to be substituted in place of the Vicente Duran tract as security for Daggs, as before stated. It was valued at $12,000.00; 900 acres were under fence, 350 acres in cultivation, and 1,000 acres in the tract. No other property besides this was agreed to be substituted. It now belongs to my wife, Mary W. Ewell, by deed from Daggs to her.

Ans. to cross-int. 31st. All the statements contained in the foregoing answers to direct and cross-interrogatories are true as therein stated. You ask me to explain why the claim of George W. Ewell was not sooner brought to light. I will endeavor to do so further if the foregoing is not sufficient. George W. Ewell knew nothing of the mortgage in question until the officer levied upon it as my property, and made and forced sale of the same. Geo. W. then went to Seguin to look into the matter, and while there wrote to me about the mortgage, and in my answer when I denied that there was any such instrument as the mortgage referred to
201 in existence, and would have sworn to that fact had I been called upon to testify concerning the matter; further, it was and is my recollection and belief that said mortgage had been long before then released by Allen as Daggs' agent, and transferred to my own land pursuant to agreement at the time of making the mortgage. After the time that I thought the mortgage was transferred to my own land, I never heard it mentioned by any one. Allen and Houston never spoke of it; J. B. Simpson, who was Daggs' agent during the war, and with whom I was well acquainted and had frequent communication, never mentioned it, and knew nothing of it so far as he ever intimated to me, although he and I had numerous conversations concerning the mortgage on my own land. Mr. Daggs never mentioned it, although he was at my house during January, 1866, and was at the sale when my property was sold, and went in an ambulance with me and my family to Washington, on the Brazos. I made all kinds of propositions to him towards settling the debt—offered any property I had (I had no money), but he never once said anything about the mortgage on Geo. W.'s land. Please allow me to answer this mystery further by asking you several questions. If Daggs, or Allen, or Simpson, or any one else who was interested knew that the mortgage was still in existence, why did they not mention it long ago? Why was it not foreclosed at
202 the same time that suit was brought on the notes and the mortgage on my land foreclosed? Where was the mortgage all this time? What was it kept hid for? If nothing wrong about it, how was it that none of the interested parties knew anything of its existence until rather

recently, when it was discovered that no release of it had ever been recorded at Seguin?

J. B. EWELL.

THE STATE OF TEXAS,
McLennan County:

I, D. O. Kelly, a notary public within and for McLennan County, Texas, do hereby certify that I am not of counsel, or attorney, or solicitor to either of the parties, nor interested in the event of the cause, and that the foregoing answers of J. B. Ewell, the witness before named, contained on preceding pages numbered from 1 to 34, inclusive, were made before me and were reduced to writing by me, and were sworn to and subscribed by said witness, J. B. Ewell, before me on this the 18th day of December, A. D. 1877. To certify which, witness my hand and official seal at Waco, Texas, on the day and date last above written.

D. A. KELLY,
Notary Public for McLennan County, Texas.

603. Fee 10$. P'd J. B. Ewell.

203 The agreement under which the deposition of John C. Wilson was taken is general, and copy of the same appears with other depositions in this cause.

The deposition of John C. Wilson, for def'ts is endorsed: Thos. J. Daggs vs. Jas. B. Ewell et als. In chancery. Deposition of John C. Wilson for def'ts. Filed June 18, 1878. M. Hopkins, cl'k.

Rec'd these depositions at the hand of J. F. Smith, who, on oath, says that he received them from the officer before whom they were taken; that they have not been out of his possession, opened, altered, or changed in any respect, but are delivered intact as received.

J. F. SMITH.

Sworn to and subscribed before me this 18th June, 1878.

M. HOPKINS, *Clerk.*

(Directed:) To the clerk of the U. S. circuit court, at Austin, Texas, and endorsed across the seal, Edw. W. Shanks, notary public, Travis Co., Texas.

Notary fees, $3.75, paid by def'ts.

Suit pending in the U. S. circuit court at Austin for the western district of Texas.

THOMAS J. DAGGS. *vs.* JAMES B. EWELL AND OTHERS. } No. 94. In chancery.

Interrogatories to be propounded to John C. Wilson, a competent witness, who resides in the county of Travis, in the State of Texas.

1. What is your name; where do you reside?

204 2. Were you acquainted with James B. Wilson during his life-time? If you say you were, then state how long you knew

him, where he resided, and what means you had of knowing where he resided.

3rd. Where did James B. Wilson reside in the years of 1855, 1856, 1857, 1858, and 1859? State, if you know, on what tract of land he resided during said years.

4th. Are you acquainted with a certain tract of land of 555½ acres, situated in the county of Guadalupe, in the State of Texas, on the Cibola River, out of surveys No. 4 & 5, known as the Vincente Durand tract, which 555½ acres of land was at one time deeded by George W. Ewell to James B. Wilson.

5th. If you say you are acquainted with said premises, then you will state who occupied the same from 1855 to the present time. Who paid taxes on the same; what improvements, if any, were made on said land during the time; when and by whom were they made?

6th. What did James B. Wilson pay for said land; when, and how did he pay for it; what was said land worth at the time he bought it?

7th. State any other fact within your knowledge that would be of service to either party, as fully as if you were specially interrogated in relation thereto.

SHEEKS & SNEED,
For Heirs of J. T. Wilson.

205 To Thomas J. Daggs, or Messrs. Walton, Green & Hill, his attorneys of record:

You are hereby notified that within five days after service of this notice the def'ts John F. Smith and the minor heirs of James B. Wilson, deceased, will apply to the clerk of the United States circuit court for a commission to take the deposition of John C. Wilson, in answer to the foregoing interrogatories and such cross-interrogatories as you may file, said deposition to be read in evidence on the trial of the above entitled cause.

SHEEKS & SNEED,
Att'ys for the heirs of J. B. Wilson, dec'd & J. F. Smith.

In chancery. In U. S. circuit court, at Austin, Texas.

THOMAS J. DAGGS
vs. } 94.
J. B. EWELL ET AL.

Cross-interrogatories to be propounded to John C. Wilson.

X-int. 1. If you answer to the direct interrogatories that you are acquainted with the land mentioned in interrogatory No. 4, and that it has ever been occupied by any one, state by whom, and for what years, and under what right did he claim so to occupy it.

X-int. 2. When did he or they first go upon the land, and when did he or they leave it? Is not the land now abandoned, and has it not been abandoned for a great length of time, and for what time?

206 X-int. 3. Do you know of the occupation of the land of your own knowledge, or is it only from information and belief?

X-int. 4. When were you first on the land, when did you first see any

one in the occupation of the tract spoken of? How many times did you ever see the land?

X-int. 5. Do you know of your own knowledge that any one was in the occupation of the land in 1856, in May and June of that year, or any time after that year, and what time?

X-int. 6. Do you know of your own knowledge that James B. Wilson paid George W. Ewell anything for the land? How do you know that he paid him? State particularly, and state in what the payment or payments consisted, whether money or other thing?

X-int. 7. Describe the improvements made on the land, amount of land in cultivation, the kind of fence, if any, the number and kind of houses, who made them, when were they made, and say how you know the truth of that of which you speak. Is there any improvement on the land now, and if you say there is, how do you know?

X-int. 8. In detailing your evidence, only speak of that you know, and say whether you have done so.

WALTON, GREEN & HILL,
Att'ys for Compl't.

207 Suit pending in the U. S. circuit court at Austin for the western district of Texas.

THOS. J. DAGGS
vs.
JAS. B. EWELL ET ALS. } No. 94. In chancery.

In pursuance of the agreement hereto attached with interrogatories, the witness (John C. Wilson) therein named personally appeared before me, at my office in the city of Austin, Texas, on the 10th day of June, A. D. 1878, and having been first sworn by me, in answer to interrogatories hereto attached and propounded to him, deposes as follows:

1st. To 1st int'y he answers. My name is John C. Wilson; I reside in Travis County, Texas.

To 2d int. he answers: Yes, he was my brother; he resided in Owensville, Robertson Co., Texas; I knew him from boyhood—he being my brother, and we were raised together.

3rd. *3rd.* To third int'y he answers: In the year 1855 he removed from Marshal, Texas, to Guadalupe County, on the Cibola; he remained there until December, 1858, and then he removed from thence to Austin, Travis Co., Texas. During his residence in Guadalupe County, 1855, 1856, 1857, & 1858, he resided on a tract of land containing 555½ acres of land in said Guadalupe County, on the Cibola, River.

4th. In answer to 4th int'y he says: I am acquainted with the tract of land described in this interrogatory.

208 5th. To 5th int'y he answers: I have already stated that my brother, Jas. B. Wilson, occupied said tract of land from 1855, until December, 1858. I occupied same tract for twelve months—self and family—and then rented it out for my brother J. B. Wilson another year; since that time and for several years thereafter, W. R. Elam, acting as agent for my brother's heirs, paid taxes on said tract. I don't think he got any rent for it. The place went down soon after I left it. J. B. Wilson

improved the place in 1855 & 1856, putting one hundred acres under fence and in cultivation, erecting one log house, two rooms & hall, & other out-houses, & cribs.

6th. To 6th int'y he answers: J. B. Wilson bought the land, as I always understood, from a man by the name of Ewell. I don't know of my own knowledge what my brother paid for the land. When I bought from my brother in 1858, I agreed to pay him $10.00 per acre for the tract, provided I liked it; I did not like it and reconveyed the tract to him in 1859. My brother bought the land in spring of 1854 or 1855—he moved onto it, and occupied it in 1855, as before stated.

Cross-interrogatories:

1st X. To 1st cross-interrogatory he answers: J. B. Wilson occupied the land, as before stated, from 1855 to 1858. I then occupied it for one year and rented it for year after to another party as agent for my
209 brother. He, J. B. Wilson, occupied it as owner, and bought from him as owner and afterwards gave the land up to him, as before stated.

2d int'y X. To 2d cross-int'y he anwsers: I have already stated he went on the land in 1855; he left it in Dec., 1858, and I left it one year afterwards. The improvements have gone down, and the place has not been occupied for a good many years to my knowledge; but I always regarded Elam as agent to attend to the property and pay taxes.

3 X-int. To 3rd cross-int. he answers: What I have stated about the occupation is from my own knowledge. I do not know who has occupied it, if any one, after the lease I gave in 1860 for one year expired.

4 X-int'y. To 4th cross-int. he answers: I was first on the land in July, 1858. I was not on it Nov., 1858. I was never on the land until July, 1858, when I went to look at it. He had been living on it since 1855. I lived on it 12 months, and have not seen the land since.

5th X-int'y. To 5th cross-int. he answers: I have already stated that my brother moved on the land in 1855. I know this from statements made by him to me, and from letters received from him after he did move on the land. He continued on the land until I bought it in 1858.

6th X-int'y. To 6th X-int'y he answers: I know nothing in re-
210 gard to payment for the land, excepting what my brother told me; he paid a big price for the land—$10.00 per acre; but that Ewell was owing him, and that it was the best he could do to take the land at that price. I don't know how the payment or payments were made—can't recollect; but I had the deed from Ewell to my brother at one time in my possession, but gave it back to my brother, J. B. Wilson.

7 X-int'y. To 7th cross-int'y he answers: I have already described the improvements made on the land in part. The fence was made out of post oak rails. The place was not improved when J. B. Wilson went on it, and I presume he made the improvements, at least he told me he did. I have stated the sources of my knowledge. I do not know whether there is any improvement or not now on the land.

8th X-int. To 8th int'y he answers: What I have derived from conversations and letters from my brother I have qualified. The remainder is of my own knowledge.

J. C. WILSON.

And said answers having been by me reduced to writing at the time and place aforesaid, were then and there sworn to and subscribed before me by said witness.

Given and certified under my hand and official seal this 10th day of May, 1878, at office in Austin, Texas.

[SEAL.] EDW. W. SHANKS,
Notary Public, Travis Co., Texas.

211 *Opinion of the court.*

U. S. circuit court, western district of Texas.

THOMAS J. DAGGS
vs.
JAMES B. EWELL & WIFE ET ALS. } 94. In equity.

Heard upon pleadings and evidence for final decree.

The facts, about which there was little controversy, were as follows:

On May 27, 1856, the defendants James B. Ewell and Mary W. Ewell, his wife, made and delivered to the complainant their promissory note of that date for the payment to his order of $3,556, three years after date, and to secure the same executed and delivered to complainant a deed of mortgage on a tract of land in Guadalupe County, Texas, containing 1,653 acres of land.

Said mortgage was duly proved for record on May 31, 1856, and recorded in the proper office on June 5, 1856. On March 9, 1872, the complainant began an action at law in this court on the same promissory note against same James B. Ewell and wife, and recovered a judgment on July 14, 1873, against said James B. Ewell for $3,530.95, the cause having been discontinued as to Mary W. Ewell, because at the date of said note she was under coverture.

212 The note and mortgage were taken for complainant, who was a citizen of Virginia, by his agents in Texas. The suit was brought on the note only by attorneys of complainant, who did not know of the existence of the mortgage, the agents having delivered to the attorney the note without the mortgage. The defense set up by James B. Ewell to the note in the action at law was usury, the amount of the note being $2,000 in cash, loaned by complainant to him, and the residue of the amount named in the note being interest at the rate of 20 per cent. per annum for the period of three years, compounded annually. The land covered by the mortgage executed by James B. Ewell was in the year 1853 the property of one Edward Dwyer. During that year the defendant George W. Ewell, who is a brother of said James B. Ewell, made a contract for the purchase of the said premises. He paid very soon after the making of the contract, to wit, in March, 1854, the cash payment, and in April, 13, 1854, by deed of that date, Dwyer conveyed the land, not to George W. Ewell, the purchaser, but to James B. Ewell, his brother. This deed was soon after recorded in the proper office.

This conveyance was made by Dwyer to James B. Ewell without the knowledge, consent, or authority of George W. Ewell.

The entire purchase money for the land was paid by George W. Ewell, who purchased for himself alone. His brother had no part what-

213 ever in the purchase of the land or in the payment of the consideration. The excuse given by James B. Ewell for the conveyance of the land to himself and not to his brother was that Dwyer wanted a mortgage to secure the deferred payment, and as George W. Ewell was living at a distance, it was more convenient to make the deed to James B. Ewell and take a mortgage from him.

George W. Ewell, having paid the entire consideration for the land, discovered in September, 1856, for the first time, that Dwyer had made the deed therefor to his brother, James B. Ewell, and demanded of James B. a conveyance of the land to himself as the rightful owner, and on September 6, 1856, James B. Ewell conveyed, by deed of that date, the land to his brother, George W. Ewell; and that deed was soon after recorded in the proper office. George W. Ewell never heard of the mortgage on said land given by his brother James B. to the complainant until September, 1873.

On December 4, 1855, George W. Ewell sold 555½ acres of said tract of land to one James B. Wilson, and gave him a bond for title, and on March 1, 1857, made him a deed for the land so sold to him. During the years 1855, 1856, 1857, and 1858 James B. Wilson resided on the tract of land purchased by him of George W. Ewell, and made

214 improvements and paid the taxes thereon. When the mortgage to Daggs was made by James B. Ewell, neither Daggs nor his agents had any actual notice of the equity of George W. Ewell in the land which the mortgage conveyed, and the only constructive notice of any title adverse to that of James B. Ewell was the purchase by Wilson of 555½ acres of the tract covered by the mortgage, and Daggs had no actual notice of the possession. In short, the testimony establishes on the one hand that the mortgage was taken by Daggs in good faith to secure a loan of money made by him to James B. Ewell, who held the legal title to the land, without notice to Daggs of an equitable title in any one else, save the constructive notice arising from the possession of Wilson of a part of the tract; and on the other hand that George W. Ewell bought the land in good faith for himself, paid for it with his own money, and never had any notice till September, 1855, that the title had been made to his brother, James B. Ewell, save the constructive notice arising from the registration of the deed to James B. Ewell in 1854, and never had any notice of the mortgage to Daggs till September, 1873.

Messrs. Wm. M. Walton and John A. Green for complainant.

Messrs. A. M. Jackson for George W. Ewell and Sheeks & Sneed, for the defendants, answering.

Woods, Circuit Judge.

215 The case made in the bill of complaint, which is simply a suit to foreclose mortgage given to secure a note made by mortgagor, ought to prevail unless the defendants have succeeded in making good some one or more of the defences set up by them. The defence made by the heirs of James B. Wilson, who was in possession of 555½ acres of the mortgaged premises at the time the mortgage was executed, and claims title thereto under a bond for title given by George W. Ewell, the equitable owner of the land, is conceded by complainant to be good, his possession being constructive notice to Daggs or his agents of the equitable title of Wilson. The only controversy is therefore between Daggs and George W. Ewell.

It is the settled jurisprudence of Texas that even the lien of a judgment creditor without notice is superior to the unrecorded deed of a vendee of the defendant in execution. (Grace vs. Wade, 42 Texas, 522.) The case of a bona fide mortgagee without notice is much stronger, for he stands in the plight of a purchaser.

The claim of defendant George W. Ewell, that the registration laws of the State have no application to his equity in the mortgaged premises, because the same was a resulting trust, will not hold.

The defendant, George W. Ewell, sets up by way of defense that the note to secure which the mortgage was given was usurious; that
216 the real consideration was $2,000 money loaned, and the residue of the amount for which the note was given was made up of interest at 20 per cent. per annum; that at the date of the note the laws of Texas forbade the taking or receiving of more than 12 per cent. per annum, and forfeited all interest if that rate was exceeded. He claims that payments have been made on the note to the amount of $1,745 which should be deducted from the principal, leaving only $255 due.

It seems to us to be a conclusive reply to this defense, that before suit was brought on the note the constitution of Texas of 1870 went into effect, and by virtue of its provisions repealed all existing usury laws, and this constitution continued of force until after the recovery of the judgment. (See sec. 4, article 12, constitution of 1870.) This left the contract as made by the parties in full force, and no forfeiture or penalty for the usury could be visited upon or against the party holding the usurious contract. (Wood vs. Kennedy, 19 Indiana). The same doctrine has been held in Georgia, and seems to be well founded in principle. (The U. S. vs. Ship Helen, 6 Cranch, 203; Norris vs. Croaker, 13 How, 429; State of Maryland, vs. B. & O. R. R., 3 How., 514.)

The fact that the constitution of 1876, provided penalties for usurious contracts could have no effect on a contract which at the time of
217 the adoption of that constitution was valid and binding.

The defendant, George W. Ewell, claims to be protected against a decree of foreclosure by the limitation of four years, prescribed by art. 4604 of Paschal's Digest of Laws, which delares that "all actions of debt, grounded upon any contract in writing shall be commenced and sued within four years next after the cause of such action or suit, and not after." The complainant replies to this that he has already brought suit on the note secured by the mortgage and recovered judgment thereon, and that the limitation cannot be pleaded as against the mortgage which is a mere incident to the note. Unquestionably this reply would be a good one to the defence of limitation if set up by James B. Ewell, the maker of the note and mortgage. So far as he is concerned, the note not being barred, the mortgage is not barred. Thus in Eborn vs. Cannon's adm., 32 Tex. 244, the supreme court says: "If the notes were a subsisting debt at the time of the institution of the suit, not barred by the statute of limitations, the mortgage executed contemporaneously to secure their payment was still valid as long as the debt remained unsatisfied. No matter at what time the power of the court was invoked for its collection and foreclosure, and for a decree to subject the mortgaged property to the satisfaction of the debt, it was opportune if the jurisdiction of the court over the debt
218 itself was not ousted. The mortgage was but an incident of the

debt, and the incident in law, as in logic, must abide the fate of the principal." See also Perkins vs. Stone, 23 Tex. 561; Duty vs. Graham, 12 Texas, 427; Flannigan vs. Cushman, 48 Texas, 241.

But George W. Ewell insists that, conceding that the mortgage is not barred as to James B. Ewell, yet it is as to him; that he can be in no worse plight than if he had signed the note and mortgage, and if he had done so the lapse of time would have barred any relief as against him.

There seems at first sight to be much strength in this position, but we do not think it will stand scrutiny. The legal title to the mortgaged premises was in James B. Ewell, and if the mortgagee was at the date of the mortgage without notice, either actual or constructive, of the equity of George W. Ewell, then he is not affected by that equity. He is in the same position that he would be if George W. Ewell's estate in the land commenced with the date of the deed made to him by James B. Ewell in September, 1856.

If this view is correct, then George W. Ewell is in the same position of any other vendee of a mortgagor's whose deed bears date subse-
219 quent to the mortgage. He cannot set up any defense to the mortgage which is not open to the mortgagors. He is in no better position than the mortgagor. The mortgagor cannot confer on him any rights which he does not possess himself. It follows from this that George W. Ewell, so far as his equities in the mortgaged premises were concerned, was bound by the judgment in the note against James B. Ewell. In other words, he was the priory in estate of James B. Ewell, and so far as his estate in the land was concerned was bound by what bound James B. Ewell. If the mortgage was good against James B. Ewell, it was good against him. If it was not barred as to James B. Ewell, it was not barred as to him. These views apply with like effect to the defence of usury. If that defence was closed as to James B. Ewell it was closed also as to George W. Ewell.

We are therefore of opinion that as the mortgage in suit is not barred against James B. Ewell, it is not barred against George W. Ewell, and therefore that the defence of limitation and staleness of claim set up by George W. Ewell must fail.

It was strongly urged by counsel for George W. Ewell that as complainant conceded that the possession by Wilson of 555½ acres of the mortgaged premises was notice of his equity; that his possession of a part was notice to complainant of the condition of the title to the entire
220 tract; that Wilson, being in possession of a part, complainant was bound to enquire as to his equities, and such enquiry would have revealed the equities of George W. Ewell.

We think this position would be sound if the complainant had actual notice of the possession of Wilson. In that case, as to Wilson's rights, have learned of the defect in James B. Ewell's title on enquiry, and would have been bound to follow up the enquiry with diligence; and such inquiry would have revealed the equities of George W. Ewell. But is not shown that complainant and his agents had any actual notice of the possession of Wilson. The possession of Wilson was therefore constructive notice to him of Wilson's rights only, and that notice being constructive, could not extend its effects beyond Wilson's possession.

Watkins vs. Edwards, 23 Texas, 443.

The case seems to be one where the equities are equal. In such a case the legal title, which is in the mortgagee, must prevail.

After considering with some care the several defences set up against the decree sought by complainant, we are of opinion that none of them can prevail, and there must be a decree of foreclosure and sale of so much of the mortgaged premises as are not covered by the claim of the heirs of Wilson.

221 *Decree.*

FRIDAY MORNING, *April* 25, 1879.

THOMAS J. DAGGS, COMPLAINANT,
vs.
JAMES B. EWELL, MARY W. EWELL, WIFE of J. B. Ewell, George W. Ewell, John F. Smith, Laura Smith, wife of John F. Smith, Ida Wilson, Sallie Wilson, and Minnie Wilson, minors, who appear by their guardian, John F. Smith, defendants. } 94. Ch'ry.

And now on this day came to be heard the above styled cause, the complainants, by their attorneys, Walton, Green & Hill, and the defendant Geo. W. Ewell by his attorneys, Jackson & Jackson, and the defendants J. F. Smith, Laura Smith, and the minors, Ida Wilson, Sallie Wilson, and Minnie Wilson were represented by their guardian, John F. Smith, & by their attorneys, Sheeks and Sneed; the defendants James B. Ewell and Mary W. Ewell came not, but wholly failed to appear, demur, plead, or answer; and the court having heard the pleadings, exhibits, and proofs, and the argument of counsel, doth order, adjudge, and decree in the premises as follows, that is to say:

1st. The defendants James B. Ewell and Mary W. Ewell, having failed to appear, demur, plead, or answer in the cause, the bill as to them is in all things taken as confessed.

2d. That as to the defendants John F. Smith, Laura Smith, and the minors Ida Wilson, Sallie Wilson, & Minnie Wilson, the law of the cause is with them and against the complainant, Thos. J. Daggs.

222 It is therefore ordered, adjudged, and decreed by the court that the said bill as to the last above-named defendants be, and the same is hereby, dismissed, and that said last above-named defendants be, and they are hereby, quieted in their title, ownership, and possession of the following-described *peace*, parcel, or tract of land, viz, 555½ acres of land described by metes and bounds, as follows: Situate in the county of Guadalupe, in the State of Texas, on the Cibola River, being a portion of survey Nos. 4 & 5, known as the Vicente Duran tract, beginning at a stake on the bank of the Cibola River, at the southwest corner of Mrs. Tarver's survey, which is the northwest corner of this survey, from which a hackberry 13 in. dia. bears S. 25° E. 36 varas, a musquite 16 in. dia. bears S. 27° W. 10 varas, and hackberry 9 in. in dia. bears S. 80° E. 11 varas,; thence north 61 E. 6,205 varas, with the south boundary line of Mrs. Tarver's survey to a post oak 12 in. in dia., from which a post oak bears N.

85° W. 14 varas, and another post oak 12 in. in dia. bears S. 15° W. 10 varas; thence south 29° E. 499 3/10 varas to a stake to be set for the southeast corner of this survey; thence S. 61° W. to a stake, to be set on the east bank of the Cibola for the southwest corner; thence up said stream with its meanders to the place of beginning, containing (555½) five hundred & fifty-five ½ acres, the said five hundred & fifty-five & one-half acres being a part of the surveys Nos. 4 & 5, & described by metes & bounds
223 in the mortgage from James B. Ewell & Mary W. Ewell, dated the 27th May, 1856, & recorded in Guadalupe County, Texas, on the 5th of June, 1856, & which will be more fully set out in this decree hereafter. And it is further ordered by the court that the said last-named defendants do have and recover of the complainants all their costs in this cause expended, viz, the sum of dollars.

3. As to the defendants James B. Ewell, Mary W. Ewell, and George B. Ewell, it appearing to the court that the complainant, Thomas J. Daggs, did, on the 14th day of July, 1873, recover a judgment against James B. Ewell in the circuit court of the United States at Austin, Texas, and in the western district of Texas, for the sum of three thousand five hundred thirty & 95/100 dollars, to bear interest from the date thereof at the rate of twelve per centum per annum until paid; and it further appearing to the court that the said James B. Ewell & Mary W. Ewell did, on the 27th day of May, 1856, make, execute, and deliver to the said Thomas J. Daggs their certain deed of mortgage on the tracts or parcels of land herein described to secure a certain note of hand bearing even date with said mortgage, which said note formed and was and is the basis of the said judgment rendered on the 14th day of July, 1873, the said land being thus described by metes and bounds, as follows: In county of Guadalupe, in the State of Texas, beginning at a stake on the bank of the Cibola Creek, at the
224 upper corner of survey No. 6 and *and* the lower corner of the original survey, from which a musquite 12 in. in dia. bears south 60½° west 4 varas, and another musquite 12 in. in diameter bears N. 81° E. 25 varas; thence north 61° east 6,710 varas to a stake from which a post oak 41 in. in diameter bears north 87° west 2 varas, and a post oak 14 in. in diameter bears N. 15° west 17 varas, this being the southeast corner of the original survey; thence north 29° west 1,539 varas to a post oak 12 in. in diameter from which a rotten post oak bears north 85° west 14 varas, another post oak 12 in. in diameter bears south 15° west 10 varas; thence south 61° west 6,205 v's to a stake on the east bank of the Cibola creek from which a hackberry 13 in. in diameter bears south 25° E. 36 varas, and a musquite 16 in. in diameter bears south 27° W. 10 varas, and a hackberry 9 in. in diameter bears S. 80° E. 11 varas; thence down said stream with its meanders to the beginning, containing sixteen hundred and fifty-three acres of land, and a portion of surveys No. 4 & 3, known as the Vicente Duran tract.

And it further appearing to the court that the said James B. Ewell is now justly indebted to the complainant, Thomas J. Daggs, in the sum of three thousand five hundred thirty & 95/100 dollars, the principal of said judgment rendered the fourteenth day of July, 1873, and the further sum two thousand four hundred forty-nine & 27/100 dollars interest
225 on said judgment; and also in the further sum of costs of this suit, less the sum charged against the complainant in the former

part of this decree, and that no part of said money, principal or interest, has ever been paid by the said James B. Ewell, or any other person for him; and it further appearing to the court that the said mortgage was given for the purpose of securing the payment of the amount which is now represented by the said judgment, it is therefore ordered, adjudged, and decreed by the court that if the defendants, James B. Ewell, Mary W. Ewell, and George W. Ewell, or either of them, shall pay into this court to the clerk thereof, on or before the first Monday in June, 1879, the sum of five thousand nine hundred eighty & $\frac{22}{100}$ dollars, the principal and interest due on the judgment & mortgage to complainant, beside interest that may accrue and the costs of the suit, the said complainants shall reconvey to the defendant George W. Ewell, who owns and has a resulting trust in the said mortgaged premises, free from and clear of any incumbrance done by him, or any person under him; but in default of said defendants paying, or causing to be paid, to complainant, Thomas J. Daggs, such principal and interest accrued on said judgment, and accrued costs, and the interest and costs that may accrue thereon by & within the
226 time aforesaid, namely, the first Monday in June next, 1879—

It is ordered, adjudged, and decreed that the said defendants James B. Ewell, Mary W. Ewell, and George W. Ewell, from thenceforth do stand absolutely debarred and foreclosed of and from all equity of redemption unto the mortgaged premises afore described, and that the said mortgaged property and premises (less the five hundred and fifty-five & ½ acres, title whereto was quieted in the defendants John F. Smith, Laura Smith, Ida Wilson, Sallie Wilson, and Minnie Wilson), or a competent part thereof, be sold, and the money to arise from such sale be applied to the payment of whatever shall appear to be due to the complainant, Thomas J. Daggs, for principal, interest, & costs aforesaid. It is further ordered, adjudged, and decreed by the court, that the marshal of this district shall execute this decree and make sale, and that such sale shall take place on the first Tuesday in July, 1879 (but may be adjourned with the consent of complainant's counsel from one legal sale day to another), at the court-house door of the county of Guadalupe, between the hours of ten o'clock and four o'clock, after the same shall have been advertized for twenty days in some newspaper published in said county of Guadalupe imme-
227 diately preceding said sale, one of which advertisements shall be posted at said court-house door, and said sale shall be for cash, and the said marshal shall execute, upon the payment of the money by the purchaser or purchasers, a deed or deeds therefore, and the purchaser or purchasers shall be let into possession of said land as against any of the parties to this suit or persons claiming under them.

In order that the said property may be fully identified, and that the sale thereof may produce the largest sum of money, it is ordered that the said marshal shall have authority, if he deems it necessary, to employ a competent surveyor to survey and identify said land, and in case it shall be deemed necessary or advantageous he shall have authority to subdivide the said land into such tracts or parcels as will cause the same to produce the greatest amount of money in the sale thereof, and in case he should cause the land to be so subdivided he shall cause a plot and field notes thereof to be made, which shall be returned into this court, together with his action, under the power conferred on him in the decree.

And it is further ordered that if the amount realized from the sale of said land should be insufficient to pay off the said judgment, interest, and costs of court, and the costs of making sale under this decree, then,
228 in that case, the clerk is ordered to issue execution as at law for the remainder against the said James B. Ewell.

Test:

W. B. WOODS, *Judge.*
T. H. DUVAL,
U. S. District Judge.

APRIL 25, 1879.

Upon the delivery of the opinion of the court, and before the enrolment of the foregoing decree, the counsel of defendant George W. Ewell gave in open court notice of appeal, and on his application the court fixed the amount of the bond to be given by said defendant to operate as a supersedeas at the sum of one thousand dollars, and the clerk was instructed to note the same upon the minutes, the court having allowed the appeal

229 *Bond for supersedeas.—Filed May* 22, 1879.

Circuit court of the United States, 5th circuit, in and for the western district of Texas, at Austin.

THOMAS J. DAGGS, COMPLAIN'T,
vs.
JAMES B. EWELL AND WIFE, MARY W. Ewell, and George W. Ewell, John F. Smith and his wife, Laura Smith, and Ida Wilson, Sallie Wilson, & Minnie Wilson, minors, & against George Knight, defendants.

Know all men by these presents that we, George W. Ewell and W. P. Hudgins & T. P. Young, of Marshal, Texas, are held and firmly bound unto Thomas J. Daggs, of the State of Virginia, in the sum of one thousand dollars, to be paid to the said Thomas J. Daggs, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 12th day of May, 1879.

Whereas the above named George W. Ewell hath prosecuted his appeal to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled action by the U. S. circuit court of the western district of Texas, sitting in equity, at Austin, in said district:

Now, therefore, the condition of this obligation is such that if the above named George W. Ewell shall prosecute his said appeal to effect, and
230 answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEORGE W. EWELL. [SEAL.]
W. P. HUDGINS. [SEAL.]
THOS. P. YOUNG. [SEAL.]

Sealed and delivered in presence of—
D. S. HAWLEY.
A. C. MARTIN.

I, Geo. Lane, county judge of Harrison County, Texas, do hereby certify that I consider the above bond good, and the sureties, over and above all exemptions, amply good and responsible for the amount named in said bond.

Given under my hand and seal of the county court of Harrison County, State of Texas, May 13, 1879.

[SEAL.] GEOR'E LANE,
County Judge.

The within bond is hereby approved.
May 22d, '79.

T. H. DUVAL,
U. S. Judge.

Filed May 22, 1879. M. Hopkins, cl'k.

231 *Bond for costs on appeal.—Filed May 22d*, 1879.

Circuit court of the United States, 5th circuit, in and for the western district of Texas, at Austin.

THOMAS J. DAGGS, COMPLAINANT,
vs.
JAMES B. EWELL AND WIFE, MARY W. EWELL, and George W. Ewell, John F. Smith and his wife, Laura Smith, Ida Wilson, Sallie Wilson, & Minnie Wilson, and against George Knight, defendants.

Know all men by these presents that we, George W. Ewell and W. P. Hudgins & T. P. Young, of Marshall, Texas, are held and firmly bound unto Thomas J. Daggs, of the State of Virginia, in the sum of five hundred dollars, to be paid to the said Thomas J. Daggs, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals; dated this 12' day of May, 1879.

Whereas the above-named George W. Ewell hath prosecuted his appeal to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled action by the U. S. circuit court of the western district of Texas, sitting in equity at Austin, in said district:

Now, therefore, the condition of this obligation is such that if the
232 above-named George W. Ewell shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEO. W. EWELL. [SEAL.]
W. P. HUDGINS. [SEAL.]
THOS. P. YOUNG. [SEAL.]

Sealed and delivered in presence of—
D. S. HAWLEY.
A. C. MARTIN.

I, Geo. Lane, county judge of Harrison County, Texas, do hereby certify

that I consider the above bond good, and the sureties over and above all exemptions amply good and responsible for the amount named in said bond.

Given under my hand and seal of the county court of Harrison County, State of Texas, May 13, 1879.

[SEAL.] GEORGE LANE,
County Judge.

The within bond is hereby approved.

T. H. DUVAL,
U. S. Judge.

Filed May 22, 1879. M. Hopkins, cl'k.

233 *Citation on appeal.—Issued June* 27, 1879.—*Served Sept'r* 19, 1879.

To the honorable Thomas H. Duval, one of the judges of the circuit court of the United States for the western district of Texas. To Thomas J. Daggs, or his attorneys of record, Messrs. Walton, Green & Hill:

Whereas James B. Ewell, Mary W. Ewell, wife of J. B. Ewell, and George W. Ewell have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the western district of Texas, at Austin, made in favor of you, the said Thomas J. Daggs, and has filed the security required by law: You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Austin, in the western district of Texas, in the 5th circuit, the 27th day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] T. H. DUVAL,
U. S. Judge.

Test with seal of circuit court at Austin, this 27th day of June, A. D. 1879.

M. HOPKINS, *Cl'k.*

234 WESTERN DISTRICT OF TEXAS:

Alex. M. Jackson, jr., being duly sworn, saith that on the 19th day of September, 1879, at Austin, he served on the appellee, Thomas J. Daggs, a copy of this citation, filed in this cause with the clerk of the circuit court in and for the western district of Texas, at Austin, by delivering copy of this citation to Wm. M. Walton, one of the firm of Walton, Green & Hill, attorneys of record in this court for Thomas J. Daggs, the appellee in the foregoing recited cause.

ALEX. M. JACKSON, JR.

Sworn to this 19' day of September, A. D. 1879, before me.

M. HOPKINS, *Clerk.*

I, Matthew Hopkins, clerk of the circuit court of the United States in and for the western district of Texas, at Austin, certify that the foregoing and annexed two hundred and thirty-four pages and fractional pages contain a full and true transcript of all the proceedings had in this court in

case No. 94, chancery, entitled Thomas J. Daggs vs. James B. Ewell, Mary W. Ewell, & George W. Ewell, & others, as they appear of file and record in this court.

In testimony whereof I have hereunto set my hand and impressed the seal of said court at Austin this 26th day of September, A. D. 1879.

[SEAL.] M. HOPKINS, *Clk.*

(Indorsement on cover:) No. 139. George W. Ewell, appellant, vs. Thomas J. Daggs. W. Texas C. C. U. S. Filed 8th November, 1879.

108-143

OFFICE SUPREME COURT U.S.
FILED
DEC 11 1882
JAMES H. McKENNEY, Clerk.

No. 139.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

GEORGE W. EWELL, *Appellant*,

vs.

THOMAS J. DAGGS, *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT.

WM. REYNOLDS,
CHAS. N. WEST,
Of Counsel for Appellant.

J. DOHLING & CO., PRINTERS, BALTIMORE.

No. 139.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

GEORGE W. EWELL,

vs.

THOMAS J. DAGGS.

BRIEF FOR APPELLANT.

N. B.—The references are to the marginal pages of the printed record.

STATEMENT OF THE CASE.

In August, 1853, George W. Ewell, the appellant, a resident of Mississippi, temporarily in Texas, contracted to purchase from Edward Dwyer, 1,653 acres of land in Guadeloupe County, Texas, for the cash payment upon which, in the following March, soon after his return home, he transmitted through his brother, James B. Ewell, then living in Texas, a draft payable to the order of said Dwyer, who, upon receipt thereof, on April 13th, 1854, executed a deed of the land, not to the appellant as he had contracted to do, but to his said brother

James B. Ewell, the excuse for this being that Dwyer wanted a mortgage to secure the deferred payments, and, as George W. Ewell was living in Mississippi, it was more convenient to make the deed to James B. Ewell, and take a mortgage from him. George W. Ewell, who made the purchase solely upon his own account and subsequently paid the entire balance of the purchase money, knew nothing of this conveyance having been made by Dwyer to James B. Ewell, until informed of it by the latter while at his house, about September 6th, 1856, at which date said James B. Ewell executed a deed of said land to the appellant, as its rightful owner, which was soon after duly recorded. In November, 1873, George W. Ewell for the first time learned that his brother James B. Ewell together with Mary W. Ewell, his wife, had executed on May 27th, 1856, the mortgage for $3,456 payable three years after date upon said land in favor of the appellee, Thomas J. Daggs, from the decree for the foreclosure of which this appeal is taken. The sum actually loaned by Daggs to James B. Ewell upon this mortgage was $2,000, the amount of the note being arrived at by compounding annually the interest thereon, at the rate of 20 per cent. per annum. On March 9th, 1872, Daggs commenced an action at law upon the mortgage note against James B. Ewell and wife, in the Circuit Court of the United States, for the Western District of Texas, and after allowing credit for $1,745,65 which had been paid at various times by James B. Ewell on account of his indebtedness thereon, obtained a judgment against him, July 14th, 1873, for $3,530.95, being the balance due upon said note with interest to that date, the cause having been discontinued as to his wife, Mary W. Ewell, because at the date of said note she was under coverture.

On January 14th, 1875, the appellee filed his bill in equity in this cause for the foreclosure of said mortgage, then making parties defendant thereto the original mortgagors, James B. Ewell and wife, and the appellant, George W. Ewell, but afterwards adding by amendment the heirs of a certain James B. Wilson, who, on December 4th, 1855, had purchased 555½ acres of said land from the appellant, receiving from him a bond of conveyance at the time, and a deed in fee on March 1st, 1857, and

who, during the years 1855, 1856, 1857 and 1858, had resided upon said 555½ acres, and made improvements and paid the taxes thereon. It being conceded by the appellee that the fact of James B. Wilson being in actual possession at the time of the execution of the mortgage to Daggs of the 555½ acres covered by the bond of conveyance from George W. Ewell of December 4th, 1855, was constructive notice to Daggs of the equitable title of Wilson, the bill was dismissed as to the portion of the mortgaged premises which had been conveyed to him, but a decree was passed April 25th, 1879, for the sale of the remaining 1,097½ acres belonging to the appellant, in default of the payment of $5,980.25, with interest from that date, from which decree this appeal is taken.

The foregoing facts are undisputed, but there is conflicting evidence in regard to the question as to whether the agents of Daggs who negotiated the mortgage with James B. Ewell had, at the time of so doing, actual notice of the equitable title of the appellant, George W. Ewell, to the mortgaged property. This evidence will be discussed hereafter.

SUMMARY OF FACTS IN CHRONOLOGICAL ORDER.

1853, August—Original contract of purchase between George W. Ewell and Edward Dwyer, (p. 136).

1854, March—George W. Ewell sent draft payable to Dwyer's order for cash payment on land, (pp. 142, 143, 181, 190).

1854, April 13th—Dwyer executed deed to James B. Ewell, (p. 18).

1855, Dec. 4th—George W. Ewell sold 555½ acres to James B. Wilson, who went into possession under bond for title, (pp. 73, 207, 209).

1856, May 27th—James B. Ewell executed mortgage to Daggs for $3,456, payable 3 years after date, on loan of $2,000, (p. 81).

1856, Sept. 6th—James B. Ewell executed deed in fee to George W. Ewell, (p.125).

1857, March 1st—George W. Ewell executed deed in fee to Wilson of 555½ acres, (p 73).

1859, Feb. 28th—	James B. Ewell paid Daggs on acct. of mortgage debt, (p. 52,)	$800.00
" Apl. 31st—	He also paid on acct.	206.65
" Nov. 3d—	" " " " "	300.00
1861, Apl. 10th—	" " " " "	39.00
1866, Jan. 23d—	" " " " "	400.00
		$1,745.65

1870, March 30th—Constitution of 1870 went into effect.

1872, March 9th—Daggs sued James B. Ewell on mortgage note, (p. 85).

" July 29th—Period of limitations expired.

1873, July 14th—Daggs recovered judgment against James B. Ewell, for $3,530.95, on note, (p. 86).

" Nov.—George W. Ewell first learned of mortgage to Daggs, (p. 138).

1875, Jan. 14th—Daggs filed bill for foreclosure of mortgage, (p. 1).

1879, Apl. 25th—Decree of foreclosure of mortgage, (p. 221).

ASSIGNMENT OF ERRORS.

The appellant's counsel will contend that the decree of foreclosure of April 25th, 1879, was erroneous for the following reasons:

1. Because it overruled the defence of the statute of limitations and staleness of claim set up by the appellant in his answer.

2. Because it disregarded the defence of usury set up by the appellant in his answer, whereby the amount for which his land was liable under the mortgage to Daggs was reduced to $254.35 instead of $5,980.25.

3. Because in fixing the sum for which the land of George B. Ewell was to be held responsible under the lien of the mortgage to Daggs, it did not take the balance due on the original mortgage note with interest thereon at the legal rate of 8 per cent., but took instead the amount of Daggs' judgment against James B. Ewell, to which George W. Ewell was not a party, and allowed interest thereon at 12 per cent.

4. Because it appears from the evidence that at the time the mortgage was executed, the appellee was affected with notice of George W. Ewell's equitable title to the mortgaged property, and is therefore not entitled to the aid of a court of equity in enforcing his claim under said mortgage as against the title of the appellant.

ARGUMENT.

The learned Judge of the Circuit Court, in concluding his opinion (Record, p. 220), says:

> "The case seems to be one where the equities are equal. In such a case the legal title *which is in the mortgagee* must prevail."

It is respectfully submitted that, although according to the system of law prevailing in most of the States, a mortgagee acquires the legal title to the mortgaged premises, such has never been the law in Texas, where on the contrary the legal title remains still vested in the mortgagor; and that therefore the reasoning of the court below, being based upon false premises, cannot support the decision arrived at.

THE TEXAS LAW OF MORTGAGES.

According to the English system, which has been adopted generally in this country, the legal effect of a mortgage is to transfer absolutely to the mortgagee the title to the mortgaged property, which title is defeasible only by performance of the conditions set forth in the instrument itself. Courts of equity indeed, looking behind the strict letter of the contract and regarding the actual intention and purpose of the parties, will compel the mortgagee to re-convey the property,

upon the application of a mortgagor, who shows that he has substantially performed the obligation which the mortgage was given to secure, or at least is ready and willing to do so; but such relief will not be given until a substantial compliance with the condition has been shown affirmatively by the complainant, and until such relief has been granted, the mortgagee has all the rights of an absolute owner of the mortgaged premises, even to the taking possession of it before default, unless otherwise provided by the instrument itself. In Texas, on the contrary, as far back as 1854, it was held that a mortgage in that State was a mere security for the payment of the debt, and that the mortgagor remained the real owner of the land and entitled to its possession; and that the mortgagee cannot sustain an action of trespass to try title or ejectment against the mortgagor or the mortgage. *Duty* vs. *Graham*, 12 Texas 427, see also, *Perkins* vs. *Stowe*, 23 Texas 561, and *Blackwell* vs. *Barnett*, 52 Texas 326; in the last of which cases the court say that

"The mortgage is so completely an incident of the debt which it is given to secure, that if the debt is barred by the statute of limitations, the creditor is left without remedy upon his mortgage. If the mortgage be upon land, the creditors cannot dispossess the mortgagor by suit after the bar of the statute is complete."

In other words, the mortgagee does not take an absolute estate in the mortgaged property, defeasible by payment of the mortgage debt, but the extent of his interest therein is that he merely holds a lien upon it to secure the payment of his debt, which lien he can only enforce by the aid of a court, upon showing affirmatively that the mortgage debt constitutes a good, valid and subsisting cause of action at the time when his proceeding under the mortgage is instituted.

STATUTE OF LIMITATIONS.

Article 4604, of Paschal's Digest of the laws of Texas, provides that

"All actions of debt grounded upon any contract in writing shall be commenced and sued within four years next after the cause of such action or suit, and not after."

The cause of action upon the note and mortgage to Daggs, accrued May 27th, 1859, and (excluding from the computation the interval between January 28th, 1861, and March 30th, 1870, as required under the constitution of 1870, Art. 12, Sect. 43), the period of limitation would expire July 29th, 1872, less than five months after suit at law had been instituted against James B. Ewell on the note, and nearly a year before judgment was recovered against him. Unless the bringing of the suit against James B. Ewell, stopped the running of the statute in favor of George W. Ewell, the defence of limitations set up by the latter in his answer to the bill for foreclosure must be successful. The court below in its opinion, says:

"George W. Ewell, so far as his equities in the mortgaged premises were concerned, was bound by the note against James B. Ewell. In other words he was the *privy in estate* of James B. Ewell, and, so far as his estate in the land was concerned, was bound by what barred James B. Ewell."

To this it is answered, that in order to bind a person by the judgment in a suit to which he was not a party, and by reason merely of his privity in estate with a party thereto, he must have acquired his title *post litem motam*.

Doe vs. *Earl of Derby*, 1 Adol & E., p. 790, per Littledale, J.
Hunt vs. *Haven*, 52 New Hampshire, p. 170.
Winslow vs. *Grindall*, 2 Greenleaf, p. 64.
Adams vs. *Barnes*, 17 Mass., p. 365.

Such appears to have been the rule followed by the Supreme Court of Texas, in the case of *Burleson* vs. *Burleson*, 28 Texas 417, which was an action brought by several plantiffs to recover certain land to which the defendant claimed to have acquired title by adverse possession. It appeared before final judgment that several of the original plaintiffs had aliened their rights to the property in litigation to third parties, who intervened in the proceeding. The court held that as against those intervenors, *who had acquired title before the bringing of the original action*, the statute of limitations, if applicable at all,

continued to run up to the time of their intervention, but that as against one, *who had purchased a share in the property after the bringing of the original suit*, the statute ceased to run from the time it was instituted by his vendor. *Miller* vs. *McIntyre*, 6 Pet. 61, 64.

In the case of *Hall* vs. *Hall*, 11 Texas 526, 547, it was expressly held that subsequent incumbrancers and purchasers of mortgaged property, were always proper parties, and in most cases necessary parties to a bill for foreclosure of the prior mortgage, and that, unless made parties thereto, they would not be bound by either the decree or the sale made thereunder; and the court also further intimated, although it did not expressly decide the point, that such subsequent incumbrancers and purchasers, some of whom had been in that case subsequently made parties defendant to the proceeding by amendment, had a right to set up for their own benefit the defence of limitations to the prior mortgage, although the prior mortgagor through whom they derived their title did not attempt to raise that defence. See also *Burke* vs. *Watson*, 48 Texas 107.

In *Miller* vs. *Rogers*, 49 Texas 398, the question whether the maker of notes secured by mortgage upon land could affect by any subsequent acknowledgement the rights of those who had purchased this land from him after the execution of the mortgage but before such acknowledgment, was raised but not passed upon by the court, which decided the case upon other grounds. But in the case of *Arledge* vs. *Hail & Co.*, 54 Texas, p. 398, the court did pass upon the analogous question as to how far a vendor's lien, when barred by the statute of limitations, could be revived by the vendee after he had parted with his title to the land on which lien was originally chargeable. In this case defendants had purchased at a Sheriff's sale lands upon which the plaintiff's assignor held a vendor's lien, evidenced by notes originally given for the purchase-money by the judgment debtor, whose title had been sold by the Sheriff; subsequently to the date of the Sheriff's deed those notes became barred by limitation, and they were renewed by the original maker. Upon these renewal notes the plaintiff instituted his proceeding, in which he sought to enforce against the defendants as purchasers at the Sheriff's sale the vendor's lien for which the original

notes had been given to his assignor—but the court held that these renewal notes did not revive said vendor's lien as against those who had purchased land upon which it existed before the period of limitation expired.

This precise question, however, as to the capacity of a mortgagor who has already parted with the title to the mortgaged property, to prevent such mortgage from being barred by limitations as against the land, has been repeatedly passed upon and decided by the Supreme Court of California, in which State, the law is almost, if not identically, the same as that of Texas, in matters relating to mortgages. The leading case upon the subject in the latter State is that of *Lord* vs. *Morris*, 18 Cal. 482, in which Field, C. J., in delivering the opinion of the court says, on page 490:

"The mortgagor after disposing of the mortgaged premises by deed of sale loses all control over them, his personal liability thereby becomes separated from the ownership of the land, and he can by no subsequent act create or revive charges upon the premises. He is, as to the premises thenceforth, a mere stranger * * * * But, it is said, that the plea of the statute is a personal privilege of the party, and cannot be set up by a stranger. This as a general rule is undoubtedly correct with respect to personal obligations, which concern only the party himself, or with respect to property which the party possesses the power to charge or dispose of. But with respect to property placed by him beyond his control, or subjected by him to liens, he has no such personal privilege. He cannot at his pleasure affect the interests of other parties."

The same doctrine has been sustained by a succession of decisions of the Supreme Court of the last named State, several of which are cited in the case of *Wood* vs. *Goodfellow*, 43 Cal. 180, 188, where it was held that although by absenting himself from the State, a mortgagor could prevent the statute of limitations from running in his own favor, he could not by such absence prevent it from running in favor of third parties who had acquired title to the mortgaged premises subsequently to the date of his mortgage.

If the above opinion in *Lord* vs. *Morris* be sound law, and it is difficult to evade the form of its reasoning, it is very hard to see upon what principal a judgment at law against James B. Ewell alone, could prejudice the rights of his brother George, who was not a party to the suit, and who acquired title long before it was instituted.

DEFENCE OF USURY.

The Texas statute upon the subject of usury which was in force at the time of the execution of the mortgage in 1856, see Paschal's Digest of Laws, § 3,942, p. 666, provides:

"That all contracts or instruments of writing whatsoever, which may in any way directly or indirectly, violate the foregoing provisions of this act by stipulating for, allowing, or receiving a greater premium as rate of interest than twelve per centum per annum, for the loan, payment, or delivery of any money, goods, wares or merchandise, bonds, notes of land, or any commodity, *shall be void and of no effect for the whole premium or rate of interest only;* but the principal sum of money, or the value of the goods, wares, merchandise, bonds, notes of land or commodity, may be received and recovered."

It appearing from the evidence in this case that the money actually loaned by Daggs to J. B. Ewell on the mortgage was only $2,000, although the face of the note was for $3,456, payable three years after date, under the rulings of the Supreme Court of Texas, in *McCorkle* vs. *Earle*, 20 Texas 231, and *Smith* vs. *Glanton*, 39 Texas 365, judgment could only be rendered for the principal sum of $2,000, less the payments made from time to time by James B. Ewell to Daggs on account of the debt, from February 28th, 1859, to January 23d, 1866 inclusive, and amounting in all to $1,745.65, which being applied in payments on account of the principal in accordance with the rule laid down in *Stanley* vs. *Watts*, 16 Texas 205, would reduce the debt to $254.35 instead of $5,983.25.

To this the court says:

"It seems to be a conclusive reply to this defence that before suit was brought on the note, the constitution of Texas of 1870 went into effect, and by virtue of its provisions repealed all existing usury laws, and this constitution continued in force until after the recovery of the judgment (See Sec. 4, Art. 12, Constitution of 1870). This left the contract as made by the parties in full force, and no forfeiture or penalty for the usury could be visited upon or against the party holding the usurious contract: *Wood* vs. *Kennedy*, 19 Ind., 68."

A sufficient answer to this objection would be that, as the Supreme Court of Texas has held in the case of *Smith* vs. *Glanton*, 39 Texas, 365, that the constitution of that State repealing usury laws did not legalize usurious contracts of date prior to its adoption, this court will, in a case like the present, follow

that constitution, whether it would or not have adopted it had the question been raised here for the first time. The fact that the suit of *Smith* vs. *Glanton*, had been instituted before the constitution of 1870 went into effect, can make no difference, for it has been frequently decided by this court that when a statute by repealing a penalty does take away a right of action for such penalty, it operates to defeat cases then actually pending quite as effectually as those which may be subsequently instituted. See *Norris* vs. *Crocker*, 13 How. 429, 440; *Steamship Co.* vs. *Joliffe*, 2 Wall. 450, dissenting opinion of Miller, Wayne & Clifford JJ. on p. 464, and many authorities there cited. *Insurance Co.* vs. *Ritchie*, 5 Wall. 541; *Ex parte McArdle*, 7 Wall. 506, 514.

But, independently of the case of *Smith* vs. *Glanton*, there is a very broad distinction between the terms of the Texas statute of usury, and that under which the Indiana case was decided. While the former expressly declared the usurious contract to be *void for the whole interest*, the Indiana statute (See 1 G. & H. p. 408), provided that a contract for interest greater than allowed by law "*shall not therefore be void*," but that the lender *should only recover* his principal without interest, and that if illegal interest were paid it might be recovered back, with ten per cent. damages, by suit commenced within a year after the payment thereof. This liability of the lender at illegal interest under the Indiana law was strictly in the nature of a penalty, and could therefore well be removed by the repeal of the statute which imposed it, while under the Texas law the usurious contract of Daggs was void *ab initio*, so far as it reserved any interest, and a subsequent repeal of the statute forbidding it could not relate back and render it valid by implication.

On January 23d, 1866, after the last payment made by James B. Ewell upon the mortgage debt, which under the law as it then stood reduced the principal to $254,35, all title and interest in the mortgaged premises was vested in George W. Ewell, subject only to a lien for that small balance, and consequently the subsequent repeal of the usury laws could not by implication divest him of any portion of that interest, or confer upon Daggs any greater claim upon said premises than he already possessed.

Such was the principal laid down in the opinions of the majority of this Court in the cases of *Steamship Co.* vs. *Joliffe*, 2 Wall. 450, and in *Osborn* vs. *Nicholson*, 13 Wall. 654. The latter case was a suit upon a note, dated March 26th, 1861, given in consideration of a slave then purchased by the maker. The Court in its opinion says on page 662.

"When the thirteenth amendment of the Constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a deed, will or contract of marriage, or other contract executed according to Statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the Statutes were in full force. This is a principal of universal jurisprudence It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundation, and let in a floodtide of intolerable evils. It would be contrary to the general principles of law and reason, and to one of the most vital ends of government. The doctrines of the repeal of statutes and the destruction of vested rights by implication are alike unfavored in the law. Neither is to be admitted unless the application is so clear as to amount to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs. There is nothing in the language of the amendment which, in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect. It is wholly silent upon the subject. The proposition if carried out in this case would in effect take away one man's property and give it to another, and the deprivation would be without due process of law. This is forbidden by the fundamental principals of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation."

In the case of *Harris* vs. *Runnels*, 12 How. 79, 84, this Court clearly draws the distinction between the effect of those Statutes which declare certain contracts void, and of others which, while containing a prohibition and a penalty, make the act they punish unlawful, but do not avoid contracts made in violation of their terms. See also *National Exchange Bank* vs. *Moore*, 2 Bond 170.

The language of Section 44, Article 12 of the Constitution of Texas of 1870 repealing all existing usury laws, is as follows:

"All usury laws are abolished in this State, and the Legislature is forbidden from making laws limiting the parties to contracts in the amount of interest they may agree upon for loans of money or other property; *provided*, this Section is not intended to change the provisions of law fixing the rate of interest in contracts where the rate of interest is not specified." (Vol. 2, Paschal's Annotated Digest Laws of Texas, page 1132.)

If this provision of the Constitution did not of itself deprive either James B. Ewell or George W. Ewell of their right to

set up the defense of usury, it is very evident that nothing done or omitted to be done by either Daggs or James B. Ewell in the suit at law upon the promissory note, could deprive George W. Ewell, who was no party thereto, of his right to oppose this defense of usury to the present attempt to subject his property to liability under the said mortgage to Daggs, for the same reasons that nothing done or neglected to be done in said suit could deprive him of his right to plead the statute of limitation.

ERROR IN AMOUNT OF DECREE.

Independently of the defences of limitations and usury, there is a manifest error in the amount for which the decree was rendered against the property in the hands of George W. Ewell, who acquired his legal title thereto after the execution of the mortgage, but before any default had been made thereunder. George W. Ewell having entered into no personal contract with Daggs, and having been made a party to no legal proceedings instituted by him before the filing of this bill for foreclosure, the utmost limit of the liability to which his land could be subjected would be the balance actually due under the mortgage at the date of its maturity, May 27th, 1859, with legal interest thereon to the time of the decree April 25th, 1879, less the payments made on account from time to time It will be noticed that the mortgage appears upon its face to have been given for the gross sum of $3,456 payable three years after date without interest. Under the Statute which has been in force in Texas since 1840, see Paschal's Digest of Laws, Art. 3,940, and Rev. Stat. 1879, Art. 2,976.

"On all written contracts ascertaining the sum payable, when no specified rate of interest is agreed upon by the parties, interest shall be allowed at the rate of eight per cent. per annum from and after the time when the sum is due and payable."

Calculated according to this rule the amount for which the decree should have been rendered would be ascertained as follows:

Amount of Mortgage due May 27th, 1859, . .		$3,456.00
Less previous payments on acct., to wit:		
Feby. 25th, 1859, . .	800.00	
April 31st, 1859, . . .	206.65	
		1,006.65
		$2,449.35
Interest at 8 per cent. to November 3rd, 1859, 5 months, 6 days.		84.90
		2,534,25
Paid on account November 3rd, 1859, . .		300,00
		$2,234.25
Interest on $2,234.25 from Nov. 3, 1859 to April 25, 1879, date of decree, 19 yrs. 5 mos. 22 days at 8 per ct.		3,379.72
		5,613.97
Less payments on account in April 10th, 1861, 39.00		
" " " " " Jan. 23rd, 1866, 400.00		439.00
		$5,174.97

The Circuit Court, however, instead of rendering a decree against the land for this amount of $5,174.97, gave one for $5,980.22, being the amount of the judgment at law recovered against James B. Ewell, July 14th, 1873 for $3,530.95 with the accrued interest thereon at the rate of 12 per cent. per anum. Why this personal judgment against James should be made the measure of the liability of George's land does not seem exactly clear, nor is it understood upon what principal this judgment should bear interest at the rate of 12 per cent. The Statute law of Texas relating to the rate of interest allowed on judgments will be found in Paschal's Digest Laws, Art. 3,943 and Rev. Statutes of 1879, Art 2,980, and is as follows:

"All judgments of the several courts of this State shall bear interest at the rate of 8 per cent. per annum, from and after the date of the judgment, except when the con-

tract upon the judgment is founded bears a specified interest greater than 8 per cent per annum, and not exceeding the highest rate of conventional interest permitted by law (12 per cent.) in which case the judgment shall bear the same rate of interest specified in such contract and after the date of such judgment.

The contract upon which this judgment was founded, being the Mortgage note, did *not* "bear a specified interest greater than 8 per cent. per annum, and not exceeding the highest rate of conventional interest permitted," and therefore the judgment should not bear 12 per cent. interest. See note as set out by appellee in his petition (page 85), and also as recited in mortgage (page 81.)

APPELLEE'S NOTICE OF APPELLANT'S EQUITABLE TITLE TO THE PROPERTY MORTGAGED.

The loan of the money by Daggs to J. B. Ewell was managed on behalf of the former by his attorney J. J. Allen, Esq., to whom he had given plenary powers to represent him in the transaction, and therefore under the ruling of this Court in the case of *May* vs. *Le Claire*, 11 Wall. 217, 233, "his knowledge was notice to his client," that Geo. W. Ewell was the equitable owner of the property, if it can be shown that Allen, in fact had such knowledge. According to the testimony of both Daggs (page 97) and of J. B. Ewell (page 185), the former while at the house of the latter in the spring of 1856, agreed to loan him money to be secured by mortgage upon lands in Texas, but returned to Virginia before the matter was consummated, leaving it in charge of his agent and attorney, Allen. Ewell says the loan was to be secured by mortgage upon his home farm in Bexar County, but Daggs says that although this may have been Ewell's understanding, his instructions to Allen were to see that he was well secured. Shortly after, Daggs returned home, Allen informed Ewell "that the money from Daggs had come," and J. B. Ewell and wife then executed the mortgage upon George Ewell's land. He states that he told Allen and his partner at the time, that he was not in a condition to execute the Mort-

gage upon his own farm at that time, as he only had a bond for the title, but that as the title to his brother George's land was in him temporarily, he could give them a mortgage upon it until he could get the deed for his own land, when the mortgage could be transferred to it in accordance with his original agreement (page 186). Allen on the contrary denies that he had any knowledge or notice whatever of George W. Ewell's equitable title to the land in question. James Ewell says that "he will always believe, and is confident of the fact, that said mortgage was released, and transferred to his own land" (pp. 189 and 199.) According to Daggs' testimony (page 97), "Mr. Ewell wrote requesting me to have this mortgage released, and the whole amount placed upon the home place which he claimed was in accordance with the agreement between us, but I left the matter in the hands of my attorney and agent, J. J. Allen," and according to Allen's testimony (page 110), two months after the execution of this first mortgage, J. B. Ewell borrowed $2.000 more from Daggs through him and gave as security for it a mortgage upon his own land in Bexar County. *This last Mortgage is not in evidence and it does not appear whether it covered both loans or only the latter one.* If it covered both loans it corroborates Jas. B. Ewell's testimony, explains why he never thought it worth while to inform his brother that he had mortgaged his land, and also shows, why Daggs, believing that the mortgage upon the appellant's land had been actually released as requested, and the note secured on J. B. Ewell's own land, was content to seek his remedy by an action at law against James B. Ewell upon the note, since it appears from the letter of J. B. Ewell put in evidence by Daggs that the Bexar County farm had actually been turned over by Ewell to Daggs in 1866, seven years before the suit was brought on this note. J. B. Ewell in his testimony (on page 202) very pertinently asks:

"If Daggs, or Allen, or Simpson or anyone else who was interested, knew that the mortgage (on appellant's land) was still in existence, why did not they mention it long ago? Why was it not foreclosed at the same time their suit was brought on the notes, and the mortgage on my land foreclosed? Where was the mortgage all this time? What was it kept hid for? If nothing wrong about it, how was it that none of the interested parties knew anything of its existence until rather recently when it was discovered that no release of it had ever been recorded at Seguin?"

It must be remembered that none of the witnesses state that they had refreshed their memory by examining the Mortgage of the Bexar County lands, and there is not one word in the testimony of either Daggs or Allen, inconsistent with the theory that it covered the first loan of $2.000 in May 1856, as well as the subsequent one in June or July when the paper was executed. If it did cover both loans, then it, and also the subsequent conduct of Daggs fully corroborate J. B. Ewell's testimony, and the only point upon which there is irreconcilable contradiction is the statement of J. B. Ewell that he informed Allen of the appellant's equitable interest in the land first mortgaged, and Allen's denial that he did so. Neither of these witnesses has any pecuniary interest in the result of this cause, but both are under equally strong inducements to desire the success of the respective parties by whom they were called. Their conflicting statements cannot be reconciled and may only be explained upon the theory of either wilful falsehood, or defective memory on the part of at least one of them. As the events about which they testified occurred twenty-one years before, and there is nothing in the case to impeach the veracity of either of them, this court must necessarily adopt the latter explanation; and if this is done, then J. B. Ewell's testimony is entitled to the greater weight, for it is far more likely that the facts and circumstances concerning the negotiation of this mortgage to which he was a party should be indellibly impressed upon his memory, then that they should make any lasting impression upon the mind of Allen who, in his professional capacity, must have been very frequently conducting and supervising similar transactions about that time, for he says in his testimony (page 117) that his "firm in 1856, and especially thereafter was engaged in an extensive law, land agency and general practice."

But, independently of any actual knowledge on the part of Allen as to George W. Ewell's equitable ownership of the land, was not the fact that in 1855, the year before the Mortgage to Daggs was executed, James B. Wilson entered into actual possession of and made improvements upon a portion of the land, embraced in that mortgage, and continued to occupy the same

under a bond of conveyance from George W. Ewell, such a circumstance as would be sufficient to put Daggs and his agents upon inquiry which must have led to a knowledge of George W. Ewell's equitable title in the entire tract? Upon this point the Circuit Court held that this possession of Wilson was constructive notice to Daggs of Wilson's rights only, and that its effects could not extend beyond Wilson's possession, and cites the case of *Watkins* vs. *Edwards*, 23 Texas 443, in support of its opinion. It is respectfully maintained on the part of the appellant however that the decision of the Supreme Court of Texas in the last mentioned case establishes the rule that adverse possession of a *part* of a tract is sufficient to put a purchaser upon inquiry as to his vendor's title to the entire tract. It was an action of trespass to try title to land bought by the plaintiffs, who claimed under a prior unregistered conveyance against defendants, who claimed as subsequent *bona fide* purchasers, without notice thereof from the same vendor. It may be noted that it appears from the statement of the evidence on page 444 as well as from the reporter's head note, that only *parts* of the land sued for and recovered in this case were in the occupancy of the tenants or vendees of the plaintiffs at the time of the purchase by the defendant; yet the occupancy of these parts was held to be notice of the plaintiffs' title to the whole tract. On page 449 the Court says:

"The possession of plaintiff's tenants was certainly sufficient to put the purchaser upon inquiry which must have led to a knowledge of the plaintiff's title. It is therefore in judgment of law notice to the purchaser of that title, he ought to be deemed to have reasonable information of a fact, who has the means of information afforded him, and whose situation makes it his duty to inquire of those from whom the information may be obtained. Such was the case of the defendant Durea, and his vendor Daily. It is admitted that at the time of their respective purchases, the plaintiffs were in possession by their tenants under leases or agreements for the purchase of the land. The plaintiffs are therefore affected with notice and cannot claim the protection of innocent purchasers. The plaintiff's older title must therefore prevail over the title under which the defendants claim."

WM. REYNOLDS,

CHARLES N. WEST,

Of Counsel for Appellant.

ADDITIONAL CITATIONS.

We submit the following additional authorities as supporting the principles laid down.

1. The rights of a vendee of property, encumbered by mortgage made before the vendee purchased, are not measured by the rights of the mortgagor against the vendee at the time of foreclosure. On the contrary, the vendee is permitted to make certain defenses of the benefit of which the mortgagor himself may have been deprived, unless

a. The vendee has purchased under a deed, which expressly conveys the property to him, subject to the mortgage — or ——

b. He has purchased from the mortgagor a mere equity of redemption.

The above qualifications of the vendee's rights do not exist in this case. (See Brief.)

2. We, therefore, contend that the appellant, G. W. Ewell, is entitled to avail himself of the defense of usury to the mortgage debt of Jas. B. Ewell, through whom he acquired his legal title.

Brolasky vs. *Miller*, 1 Stockt. R. 807.
Daub vs. *Barnes*, 1 Md. Ch. Dec. 128.
Post vs. *Dart*, 8 Paige R. 640.
Green vs. *Tyler*, 39 Penn. St. R. 361.
Dix vs. *Van Wyck*, 2 Hill R. 522.
Berdan vs. *Sedgwick*, 40 Barb. R. 359.
Dawson vs. *Callaway*, 18 Ga. 573.
Banks vs. *McClellan*, 24 Md. 62.
Trumbo vs. *Blizzard*, 6 G. & J. 18.

4. Nor does a judgment against the mortgagor preclude his vendee from this defense.

Brolasky vs. *Miller*,
Berdan vs. *Sedgwick*,
Trumbo vs. *Blizzard*,
Post vs. *Dart*,
} Sup.

5. The right of the vendee in this case is not impaired by the repeal of the usury law, in force when the usurious contract was made.

Pond vs. *Horn*, 65 N. C. R. 84.

Simonton vs. *Vail*, 11 Wis. R. 90.

Story vs. *Kimbrough*, 38 Ga. R. 21.

Magwood vs. *Dugan*, 1 Hill R. 182.

We also refer to the principle established in England by the case of *Flight* vs. *Reed*, (32 L. J. Ex. 265) in which it was held, precisely as in *Story* vs. *Kimbrough*, (supra) that the debt, which was originally void by the usury law then in force, was not revived by the repeal of such law, but only put in such a position that a subsequent express promise or novation thereof would be enforcable against the promisor.

6. In like manner the mortgagor's vendee may set up the bar of the statute of limitation against the debt.

Eubanks vs. *Leveridge*, 4 Sawy. 274.

Grattan vs. *Wiggins*, 23 Cal. R. 16.

MEM. The cases of *Stafford*, 12 How. R. 327, were decided in 1851, prior to the adjudication by the Supreme Court of Texas as to the nature of a mortgage in that State.

WM. REYNOLDS,
CHAS. N. WEST,
For Appellant.

108-143

OFFICE SUPREME COURT U.S.
FILED
DEC 13 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

GEORGE W. EWELL, Appellant,
v.
THOMAS J. DAGGS.

BRIEF FOR APPELLEE.

Statement of the Case.

James B. Ewell and Mary W. Ewell, his wife, executed a promissory note to Thomas J. Daggs on the 27th of May, 1856, by which they promised three years after date to pay said Daggs the sum of $3,456, (Pr. Rec., 36, 37,) and of same date executed a mortgage to secure the same on a tract of land known as the Vincent Duran Tract, containing 1,653 acres, which was duly recorded. (Pr. Rec., 7, 8, 9.) It was recited in the deed that said tract had been conveyed to said James B. Ewell by Dwyer and wife, by deed dated April 13, 1854.

It seems that five payments were made on said note, in all $1,745.65, the first of which was made February 28, 1859, before its maturity, and the last of which was made January 23, 1866, long after maturity, and were indorsed on the note.

Daggs brought suit on the note in the Circuit Court of the United States for the Western District of Texas, and judgment was rendered thereon July 15, 1873, for $3,530.95, with interest from the date of the judgment at the rate of 12 per cent. per annum, and costs. (Pr. Rec., p. 36, 37, 38.)

On the 14th of January, 1875, Thomas J. Daggs filed his bill for a decree of foreclosure of said mortgage in the said court, wherein *inter alia* he set out that George W. Ewell, a brother of said James B. Ewell, had taken a deed for the mortgaged property from said J. B. Ewell, in consideration of $4,900, bearing date September 6, 1856, more than three months after the date of said mortgage.

In consequence of this, said Daggs made said George W. Ewell a party defendant to his said bill, and charged that the same was void and of no effect as against his claim under said mortgage.

To this bill J. B. Ewell made no answer, and the same as to him was taken *pro confesso.*

George W. Ewell answered and relied upon several defenses—

1. Statute of limitations.

2. That James B. Ewell had bought the land in controversy of Dwyer and wife, as agent for George W. Ewell, and with his money, and that he had, without said George's authority, taken the deed in his own name, whereby a trust resulted to him, the said George W. Ewell.

3. He demurred on three grounds—

1st. That it appeared the claim was barred by limitation.

2d. Lapse of time and laches.

3d. That the prior suit and judgment at law on the note precluded the plaintiff from his bill to foreclose the mortgage.

Respondent (George W. Ewell) further alleged that in 1856 or 1857 he had conveyed five hundred and fifty-five acres, a part of said mortgaged land, to J. B. Wilson, and

that therefore said Wilson was a necessary party defendant in said cause.

The court (Pr. Rec., p. 17) overruled the demurrer of said George W. Ewell, but required plaintiff to amend his bill and make J. B. Wilson a party to the suit.

Amended bill was filed making the same parties as were defendants to the original bill, and the heirs of said J. B. Wilson, parties defendant in the cause.

George W. Ewell answered, and relied on the same grounds presented in his previous answer, and on these in addition:

1st. That the principal of said promissory note was only $2,000, and that $1,456, the residue of the same, was usurious interest, and that by the laws of Texas then in force the contract for the whole interest was void.

2d. That the payments made upon the said note should be credited not on the said interest, but on the principal sum—$2,000.

Wilson's heirs filed their answer, said J. B. Wilson being dead. (Pr. Rec., p. 30, et seq.)

They rely on the deed of George W. Ewell dated March 1, 1857, which, they allege, was based on a title bond of George W. Ewell dated December 4, 1855. They allege that J. B. Wilson went into possession of said five hundred and fifty-five acre tract in 1855, and was in possession thereof when the mortgage to Daggs was executed, on the basis of which they rely upon constructive notice to Daggs of their title to said five hundred and fifty-five acres when he took his mortgage. This answer is based on information received by respondents, and not on personal knowledge of the facts.

Depositions were taken in the cause.

Daggs proved he had no notice of George W. Ewell's title, nor of Wilson's.

J. J. Allen, a lawyer of high character, the agent of Daggs in negotiating the loan, proves he had no notice of the title or claim of George W. Ewell, or of Wilson.

James B. Ewell testifies to the resulting trust in George W. Ewell; that he took the deed from Dwyer to himself in order to give a mortgage to secure the purchase-money, as his brother, George W. Ewell, was absent in a distant State; that Daggs and Allen both had notice of the right of George W. Ewell.

George W. Ewell proves his resulting trust; that he never authorized J. B. Ewell to take deed in his own name; that he traded five hundred and fifty-five acres of the land to J. B. Wilson in the summer of 1856.

John C. Wilson proved that he heard J. B. Wilson say he moved on the land in 1855. (Pr. Rec., p. 82, answers to 4th and 5th cross-interrogatories.) Of his own knowledge he knew nothing of the possession.

The court decreed in substance a foreclosure of the mortgage as to all the land embraced in the deed of May 27, 1856, except as to the 555 acres which was conveyed to J. B. Wilson, holding his possession was constructive notice to Daggs of his title.

From that decree George W. Ewell has appealed.

Points in the Case.

1. Does the statute of limitations bar the plaintiff's remedy?

On this point I need only refer to the views of the learned judge in the court below. (Pr. Rec., 85, 86.)

Unless James B. Ewell can plead the limitation it will not avail George W. Ewell; for his right being unrecorded, and Daggs being a purchaser for value without notice of

George W. Ewell's claim, *quoad* Daggs, George W. Ewell's right can only be recognized as under and in privity with James B. Ewell, the mortgagor, by the deed to him of September 6, 1856; and can claim no other right under the act of limitations than James B. Ewell could claim.

That James B. Ewell cannot claim the benefit of the limitation is settled by the cases cited by Justice Woods (Pr. Rec., pp. 85, 86): Eborn *v.* Cannon, 32 Tex., 224; Perkins *v.* Sterne, 23 *Id.*, 561; Duty *v.* Graham, 12 *Id.*, 427; Flannegan *v.* Cushman, 48 *Id.*, 241.

2d. Usury is pleaded by George W. Ewell. The same views prevail as to this defense.

Besides, the repeal of all usury laws by the constitution of Texas of 1870, art. 12, § 44, debarred James B. Ewell of that plea in the suit brought at law in 1872, on which there was judgment July 15, 1873. That judgment concludes all defenses between the mortgagor and mortgagee, and hence between the latter and all claiming under the former.

In addition to the authorities cited by the learned judge, (Pr. Rec., p. 85,) I refer to a number of cases in which the effect of a repeal of all usury laws has been held to preclude the plea of usury to a contract void for usury at its date:

Curtis *v.* Leavitt, 15 N. Y. Rep., 1.
Lewis *v.* McElvain, 16 Ohio Rep., 347, 599.
Parmelie *v.* Lawrence, 48 Ill. Rep., 331.
Andrews *v.* Russell, 7 Blackford, 474.
Baugher *v.* Nelson, 9 Gill, 299.
Satterlee *v.* Matthewson, 16 Serg. & R., 191.
Goshen *v.* Stoughton, 4 Conn., 209.
And in Town of Danville *v.* Pace, 25 Grattan, 1, where all the cases were elaborately reviewed by Staples, J.

All of these decisions rest upon the ground that the usury laws are penal statutes; that a repeal of the penalty only leaves the party bound by his contract, which is validated by the repeal; that such laws of repeal are not unconstitutional, as they do not impair the obligation of a contract, but only validate what would, but for the repeal, be invalid on plea by the defendant, and that defendant cannot plead a repealed law in bar of his honest contract, though he might but for such repeal have pleaded it in bar of a recovery on such contract, as a penalty inflicted on the promisee for entering into it.

The same reasoning is applicable to the defense, which seeks to apply the payments to the principal of the debt, and not primarily to the usurious premium.

3d. An objection was made to the bill that, after judgment on the note, the plaintiff was precluded from proceeding to enforce his mortgage.

The only cases in which any decisions have ever been made which could furnish a pretense for this contention, have been based on the character of the English decree of foreclosure. That forfeits the mortgaged subject for the non-payment of the mortgage debt. And as the subject may be in value much more than the debt, and the mortgagor has been foreclosed without opportunity to show this, it was held to be a bar to procedure to enforce the debt at law.

But when the judgment at law is unavailing, as in this case, there is no ground to bar relief in equity, which is ancillary to the legal right of the creditor.

And in America, where we have adopted the Irish bill of foreclosure, in which a decree of sale is ordered, there is no reason for holding that the creditor may not at law recover the balance of debt which remains unpaid under a decree of foreclosure.

On this point I cite—

King *v.* King, 3 P. Wms., 358.
Howard *v.* Harris, 1 Vernon, 190.
Davis *v.* Bolton, 2 Russ. & Myl., 76.
2 Foublanque's Eq., 282–3.
James *v.* Johnson, 6 John. Ch., 417.
Schofield *v.* Cox, 8 Grattan, 533.
Betz *v.* Heeburn, 7 Penn. St., 280.
Burdett *v.* Clay, 8 B. Monroe, 285.
Patterson *v.* Hill, 9 Cowan, 747.

4th. All of the foregoing defenses would be valid, or would indeed be needless, unless Daggs was a purchaser for value without notice of George W. Ewell's equitable claim.

Under this head, therefore, we must examine:

First. Had George W. Ewell such equity? His own deposition and that of J. B. Ewell prove it, though the deed from J. B. Ewell to George W. Ewell, of September 6, 1856, states the consideration for that conveyance to have been $4,954. This throws a strong suspicion upon the claim.

Second. But did not George W. Ewell, by permitting J. B. Ewell to take the deed and give a mortgage for the purchase-money, mislead Daggs; and can he set up his claim against him now? Is he not estopped *in pais* to do so?

Third. But conceding the validity of the claim, I insist there is no proof of actual or constructive notice.

1. As to actual notice.

The only pretense of evidence of such notice is the testimony of James B. Ewell. After twenty years he says

that Daggs and Allen, his agent, knew of George W. Ewell's claim.

Daggs says he never had any such notice, and so does Allen; so that the affirmative is met by as decided a negative.

The probability is against the notice. James B. Ewell may have confounded the two mortgages, which he gave to Daggs for two distinct debts. (See answer to 6th interrogatory in deposition of J. J. Allen, Pr. R., p. 48.)

But it is most improbable that a creditor, or his agent, an able lawyer, would have thought for a moment of taking a mortgage for a loan of money on land to which both or either knew the mortgagor had no title.

The judge in the court below, therefore, properly held that the proof of notice, which chancery always requires to be clearly established, was wholly insufficient.

2. Was there any constructive notice?

This is alleged from the possession of J. B. Wilson. It is not pretended that Daggs or his agent, J. J. Allen, had any actual notice of J. B. Wilson's possession of the five hundred and fifty-five acres. But as that possession would have led to knowledge of George W. Ewell's claim, it is insisted it gave constructive notice to Daggs as to the part possessed by Wilson, and by building on this a second constructive notice, it is insisted that Daggs must be held as having notice of George W. Ewell's whole claim.

In answer to all this, I submit—

1st. George W. Ewell, by his answer, makes no such defense as to himself or as to Wilson. Wilson's heirs made it, and the court sustained their defense.

2d. The appellant does not appeal from the decree as to Wilson's heirs. He might well have done so, as I will show; for—

3d. There is no proof of any such possession. George W. Ewell's original answer alleges he sold and conveyed to Wilson in 1856 or 1857. (Pr. Rec., p. 16.) In his second answer he says nothing of the matter. In neither does he rely on Wilson's possession as notice to Daggs of any claim by himself or Wilson.

In his deposition he says: "In the summer of 1856 I traded J. B. Wilson 555 acres," &c. Daggs's mortgage was dated May 27, 1856, and was recorded June 3, 1856. The proof by George Ewell fails, therefore, wholly to prove a possession by Wilson prior to the mortgage to Daggs.

The deposition of J. C. Wilson proves nothing of his own knowledge—only what he had heard from J. B. Wilson.

There is thus an entire absence of any proof of possession by Wilson prior to the mortgage to Daggs.

4th. But conceding Wilson's possession of the 555 acres prior to mortgage to Daggs, can this be held constructive notice beyond his title, and become constructive notice of all of George Ewell's claims?

The learned judge in the court below well said, in order to do so there must have been *actual* notice by Daggs or his agent of Wilson's possession. It is hard enough to hold an unknown possession to be constructive notice in favor of Wilson. But to extend it further would be manifestly unjust. It avails for Wilson, because by his possession he gives a *quasi* notice to all purchasers, and he should be protected because he did so. But why should that avail George Ewell, who gave no such warning, and left strangers to deal with his agent, who held the legal title, without notice of his claim or warning against loss?

These views have been most fully expounded in the English Chancery.

Lord St. Leonards in the last edition of his great work has sanctioned the language of Lord Cranworth in Ware

v. Lord Egmont, 4 De Gex, M. & G., 473, which is as follows:

"The question, when it is right to affect a purchaser with constructive notice, is not whether he had the means of obtaining, or might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross and culpable negligence."

See 2 Sugd. Vendors, 14th ed., 755, and English and American cases there cited. Also, the decision of Sir James Wigram in Jones *v.* Smith, 1 Hare, 43; S. C., 1 Phil., 244; West *v.* Reid, 2 Hare, 257; Montefiero *v.* ———, 7 H. of L. Cases, 241; 1 L. R. Ch., 463.

I submit, on every ground the decree must be affirmed.

Respectfully,

J. RANDOLPH TUCKER,
For Appellee.

DECEMBER 11, 1882.

108-153

In the Supreme Court of the United States.

United States ex-parte William G. Warden, Joseph D. Potts, James A. Wright, and Edward N. Wright.

Petition for a Writ of Alternative Mandamus to the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania.

MORTON P. HENRY,
For Relators.

ALLEN, LANE & SCOTT, PRS., PHIL.

To the Honorable the Justices of the Supreme Court of the United States:—

The petition of William G. Warden, Joseph D. Potts, James A. Wright, and Edward N. Wright, all of the city of Philadelphia,

Respectfully showeth:—

That on the nineteenth day of September, A. D. 1879, the petitioners became stipulators in the sum of $70,000 on behalf of Samuel Jackson, master, and claimants of the steamship "Belgenland," in a certain cause of collision brought in the District Court of the United States in and for the Eastern District of Pennsylvania, in Admiralty, wherein Theodore Jensen, master of the bark "Luna," was libellant.

That the condition of the said stipulation was in the following words: "Now if the said claimant shall and will truly abide by all orders interlocutory or final of the said court and of any appellate court in which the said suit may be hereafter depending, and shall fulfill and perform the judgment or decree which may be rendered in the premises, and also pay all costs, &c., this stipulation shall be void, otherwise in force, and execution may issue by virtue thereof at one and the same time against any or all the parties to this stipulation."

That it was so proceeded in the said court that on the fourteenth day of February, 1881, a decree was entered in favor of the libellant for the sum of $50,278.23.

That thereupon the said claimant, within ten days, appealed from the said decree to the next term of the Circuit Court of the United States in and for the Eastern District of Pennsylvania, and gave bond with your petitioners as sureties according to the course of the court

in causes of admiralty jurisdiction, that the claimant would prosecute the said appeal with effect, which appeal became a *supersedeas* of the decree in the District Court.

That it was so proceeded in the said cause on appeal in the Circuit Court, that afterwards, on the 22d of October, 1881, a decree was finally entered in the said Circuit Court of the United States sustaining a previous decree in said court of the 14th of October, 1881, in favor of libellant, for the sum of $51,954.14, in the following words :—" And now, this fourteenth day of October, 1881, this cause having been heard on the pleadings and proofs, and having been argued by the proctors of the respective parties, and due deliberation being had in the premises, it is ordered, adjudged, and decreed, that the libellant recover for himself and the other parties in interest, from the respondent Samuel Jackson and his stipulators Joseph D. Potts, William G. Warden, Edward N. Wright, and James A. Wright, his or their damages for the collision mentioned in the libel, amounting to $50,278.23, with interest from the 25th March, 1881, amounting to a further sum of $1675.91, to the date of this decree, and aggregating the sum of $51,954.14 payable to the several parties in interest," according to a table therein set forth, and that the said decree was also entered by the clerk of the said court as a lien against the real estate of each of your petitioners in a docket called the Judgment Docket of the said Circuit Court, in which all decrees are entered against parties in the said court.

Whereupon an appeal was on the same day duly taken by the claimant from the said decree to the Supreme Court of the United States, and that the said appeal was duly perfected on the same day, viz., October 22d, 188 , by the claimant giving bond with the same stipulators as sureties in the sum of $70,000, conditioned that the claimant and appellant would prosecute his appeal to the Supreme Court of the United States with effect, which

said appeal was also a *supersedeas* of the decree of the Circuit Court in the said cause, and the said cause is now pending in the Supreme Court of the United States.

That each of your petitioners are seized of real estate lying within the said district, the transferability of which is affected by the entry of the said decrees against them as stipulators as aforesaid by reason of the lien created by virtue of said decrees.

That on the eighth day of February, A. D. 1883, your petitioners presented their petition to the judges of the Circuit Court of the United States in and for the said district, praying that an order might be made striking off so much of the said decree in the Circuit Court as makes the same a decree against your petitioners the stipulators, for the payment of the said sum of $51,954.14, and to vacate the same, and to certify an order to the District Court of the United States, directing the said District Court to strike out so much of the said decree entered in the said court as made the same a decree against your petitioners, and directing the same to be vacated, and that on the 5th of March, 1883, the said Circuit Court refused the prayer of your petitioners.

Your petitioners show that they are hindered and affected by the cloud on the titles of their respective real estates within the said district by reason of the decrees so rendered against them as stipulators as aforesaid; that titles have been refused by purchasers—and they are advised that such decrees are improvidently entered against them, as an appeal in admiralty operates not only as *supersedeas*, but also vacates any decree of the court from whose decree the appeal is taken, and that no decree can be lawfully entered against stipulators whose obligation is conditional on the performance of the decree which may be finally rendered against the claimant, within the ten days allowed to the claimant, in which he may take an appeal from the decree ren-

dered: and that your petitioners are without remedy in the premises, unless redress is given as herein prayed, as no writ of error or appeal lies to the order of the court refusing to vacate said decree.

Wherefore your petitioners pray this Honorable Court will direct an alternative writ of *mandamus* to issue out of the Supreme Court of the United States, directed to the Honorable William McKennan and the Honorable William Butler, Judges of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, commanding the said judges to vacate the said decree entered on the 22d of October, 1881, in the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, against your petitioners, as stipulators as aforesaid, for the claimant of the steamship "Belgenland" in the said case of collision, wherein Theodore Jensen is libellant, of October Sessions, 1881, No. 2. And your petitioners as in duty bound will ever pray.

Before me, John Rodgers, a notary public duly commissioned under the laws of the Commonwealth of Pennsylvania, with authority to administer oaths and affirmations, &c., personally appeared James A. Wright, who, being duly affirmed according to law, did depose and say that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

Affirmed to and subscribed
before me this
day of March, 1883.

W. Virginia 18-153

In the Supreme Court of the United States.

The United States *ex-parte* William G. Warden, Joseph G. Potts, James A. Wright, and Edward N. Wright.

MOTION FOR A MANDAMUS.

BRIEF ON BEHALF OF THE RELATORS.

Allen, Lane & Scott, Printers, 229-231 South Fifth Street, Philadelphia.

In the Supreme Court of the United States.

The United States, ex parte, *William G. Warden, Joseph G. Potts, James A. Wright, and Edward N. Wright.* } Motion for a Mandamus.

BRIEF ON BEHALF OF THE RELATORS.

I. The right to the writ.

The relators are not parties actors in the cause in which the decree is entered against them. They are sureties and not entitled to an appeal or writ of error. The Wanata, 5 Otto, 505; The Ann Caroline, 2 Wallace, 548. They are deprived of the use of their real estate by the docket entry of a decree against them as stipulators; which decree became vacated by an appeal, taken by the claimant, to this court and perfected by giving bond, conditioned that the appellant should prosecute his appeal with effect.

Their only remedy is by *mandamus*, as prohibition does not lie to the Circuit Court. The Bank of Columbia *vs.* Sweeny, 1 Peters, 569. The *mandamus* is applied for here, after application first made for relief to the court which entered the decree, and a refusal of relief by that court.

The decree against stipulators was entered simultaneously with the decree condemning the ship. If such a decree is either lawful or discretionary, this application must fail.

If such a decree is unlawful according to the methods of judicature in admiralty, and under the acts of Con-

gress regulating appeals, then it is a nullity; and should have been stricken off or vacated; even though its invalidity did not create a valid lien, because it created a cloud on the title of the relators' real estate.

The fact that the entry of such a decree on the judgment docket may be treated as an irregularity of the clerk does not affect the right to a *mandamus*, as that court has a supervisory and protective power over its own records and the papers belonging to its files, and may at any time direct the correction of clerical error. Hottester & Smith *vs.* The Judges of the District Court of Lucas County, 8 Ohio State Reports; True *vs.* Plumley.

"The writ may be addressed to subordinate judicial tribunals, requiring them to exercise their functions, and render some judgment in cases before them, when otherwise there would be a failure of justice from a delay or refusal to act. Moses on Mandamus, page 22.

It is only where the act is discretionary that the court will not direct what decision shall be made. *Ibid.* The Bank of Columbia *vs.* Sweeney, 1 Peters, 569.

The fact that a sentence is pronounced by a court does not render it judicial in that sense—otherwise *mandamus* would never lie for judicial acts; the sentence to be judicial must be one which the court has power to make in the exercise of its judicial discretion A sentence, giving an extraneous effect to a judgment *in rem*, so as to affect the property of others, is either lawful or not —it is not within the discretion of the court in moulding its decree, to give or refuse the lien which arises by operation of law. The General Smith, 4 Wheaton, 443.

II. The illegality of the decree against stipulators before final adjudication on appeal.

The legality of such a decree as the one entered against the relators, has been passed upon, by Mr. Justice Blatchford, in the Circuit Court of New York; in The

New Orleans, 17 Blatch., 216, in which this question was the only point involved.

The court decides that such a decree in proceedings *in rem can not* be entered against the stipulators within the time in which an appeal becomes a *supersedeas* of the decree. In the opinion, delivered after an examination of the acts regulating appeals in admiralty, the court says: 'The obligation of the sureties being an obligation only that the appellants shall pay when obliged to pay, can not be enforced against them in any manner, even to the extent of entry of judgment against them, until the obligation of the appellants to pay comes into force."

The motion was to enter judgment on the appeal bond given by three of the claimants, on appeal to the Circuit Court. All three of the parties, against whom judgment was asked, were claimants; two of them were also the stipulators for value on arrest of the vessel; so that in every aspect the right of a personal judgment against the parties stipulators or as obligors was adjudicated.

Every consideration of the effect of an appeal, and the nature of admiralty procedure, forbids such a judgment against stipulators.

III. This decree not a lawful judicial sentence against the relators?

The effect of appeals in admiralty was passed upon by this court in its earliest adjudications. It vacates and suspends the sentence of the subordinate court.

In The Cassius, 15 Cranch, by Chief Justice Marshall; in The United States *vs.* Preston, 3 Peters, 66; in the case of Wiscart *vs.* Dauchy, 3 Dallas, 321; and later in the Lucille, 19 Wallace, 77.

Its effect differs from that of a writ of error to a judgment, and is stated by Chief Justice Marshall to be "that in admiralty cases an appeal suspends the sentence; and

it is not *res adjudicata* until the final sentence of the appellate court be pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice, not only in cases of appeals from the District Court to the Circuit Courts of the United States, but *in this* court also."

The same effect is given to the appeal in equity. 35 Vermont, 449; 17 Pickering, 142; 20 Ibid, 570.

This principle governs all appeals in admiralty. The appeal takes up the *res*. So that the District Court after an appeal perfected can not make an order in reference to the cause. The Collector, 6 Wheaton, 194; The Lucille, 19 Wallace, 73.

In one respect only has this been altered by the statute (Revised Statutes 701), which requires this court to to send down its mandate to the Circuit Court to execute decree on appeal. The reason for this statute is obvious and does not affect the principle. The Collector ante.

The decree complained of, enters a decree *in personam* against stipulators at the moment it condemns the *res*.

In proceedings *in rem* in collision, the court adjudicates the vessel and not its owners. The parties to the cause are the libellant and the *res*, the proceedings *in rem* put all interests at stake, the vessel is treated as a personality, capable of doing right or wrong, and as such is liberated or condemned, without regard to the fault or innocence of the owners. The Malek Adhel, 2 Howard, 410, so that the condemnation of the vessel does not necessarily imply a liability *in personam* of the owners. The Schooner Freeman *vs.* Buckingham, 18 Howard, 182.

The claimant does not become personally responsible as such; the claimant intervening for the interest in the vessel is generally the master as bailee, seldom the owner, and may be a mortgagee or consignee, even a foreign consul.

The claimant first becomes personally responsible by entering into the bond, and the stipulators by their engagement that the claimant shall perform the order and decree of the court which arrests the vessel. That is the office of the stipulations as a substitute for the *res.* It does not change the form of the action from one *in rem* against the vessel to one *in personam* against the claimant and stipulators. The decree is as in The Wanata, 5 Otto at page 604, that the amount awarded against the vessel be paid out of the stipulation for value.

The final decree to which the appeal lies condemns the vessel and assesses the damages if found in fault. The execution may proceed against claimant and stipulators at the same time by virtue of the act of 1847 (Revised Statutes, section 942.) But the engagement of the stipulators is none the less collateral to the proceedings *in rem.* The stipulator is a surety with all the rights incident to suretyship and not a principal. He is entitled to subgation and redress as a surety. Within the ten days allowed the claimant to appeal, Revised Statutes (section 1007 and 1012), sentence is not pronounced against the stipulator because an appeal vacates the decree and his obligation does not become fixed, and if the stipulator should within that time satisfy the decree, he would have no recourse against his principal,—and the admiralty procedure, does not pronounce a sentence, he can not fulfil, without losing recourse against his principal.

The act of 1847 (Revised Statutes, section 942) is the law under which the court awards by its decree performance by principal and surety at the same time—without recourse being first had to the principal, and without separate suit on the bond as required in usual proceedings at law. It does not vary the effect of the appeal within the time given by the act of Congress, which vacates the decree of the subordinate court. To read the act of 1847 literally, obliterates the acts of 1789, and 1803 (Re-

vised Statutes, 1007, 1012), and would authorize the court, to award execution, at the time it enters the decree.

It authorizes the court when the cause is ended and the sentence becomes final by decision in the appellate court, or by failure to appeal within the time limited by law, to enforce the final decree *in rem*, by execution against claimant and stipulators without suit on the bond.

The law of lien on real estate in Pennsylvania is consistent with this view. The lien, although recognized by statute, like the lien in England, grows out of the liability of the land to be taken in execution for the payment of debt. And where a judgment can not be enforced by execution against the defendant's land, it is no lien on the land. Leedom *vs.* The Plymouth Co., 5 W. & S. 265; Schaffer *vs.* Cadwalader, 12 Casey, 121.

The lien of a judgment continues after a writ of error taken at common law, because it is only a *supersedeas* of execution, while the appeal in admiralty obliterates the decree from which the appeal is taken. There is therefore no decree to create the lien.

MORTON P. HENRY,
For the Relators.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

IN RE BELGENLAND.

March Term, 1883.

OPINION OF THE COURT *sur* PETITION OF W. G. WARDEN *et al.* TO STRIKE OFF AND VACATE DECREE.

The counsel for petitioners admits that the court can not interfere with the decree except upon the ground that it was entered without authority, and is therefore null and void, the record having been removed by appeal and the term having passed. It is sufficient therefore to say that I do not doubt the court's authority to enter the decree against the stipulators as it did. The uniform practice of the district has been to do so under similar circumstances, and it is, in my judgment, sustained, not only by the general authority of courts of admiralty everywhere, but here especially by the act of Congress relating to the subject, approved March 3d, 1847.

Whether, in view of the fact that new sureties are required in taking an appeal, thus securing the libellant under such circumstances beyond all danger of loss, it would be wise to so mould the decree as to avoid creating a lien against the stipulators, pending the appeal, may well be considered hereafter. The inconvenience of such a lien may be very great, and the danger of having to submit to it may deter the most desirable individuals for such a service from assuming the obligations of stipulators.

March 5th, 1883. Prayer of petitioners refused.